

No. 12277

United States
Court of Appeals
For the Ninth Circuit.

LOUISE K. GODFREY,

Appellant,

vs.

JAMES G. SMYTH, United States Collector of
Internal Revenue at San Francisco, California,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California
Southern Division

FILED

AUG 26 1949

PAUL P. O'BRIEN,

CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

I. M. PECKHAM, Esq.,

400 Montgomery Street,
San Francisco, California,

Attorney for Plaintiff and Appellant.

FRANK J. HENNESSY, Esq.,

United States Attorney,
Northern District of California,
Post Office Building,
San Francisco, California.

Attorney for Defendants and Appellees.

Trial before the Honorable Dal M. Lemmon, District Judge, sitting without a jury.

District Court of the United States, Northern
District of California, Southern Division

27659G

LOUISE K. GODFREY,

Plaintiff,

vs.

UNITED STATES OF AMERICA, and JAMES
G. SMYTH, UNITED STATES COLLEC-
TOR OF INTERNAL REVENUE at SAN
FRANCISCO, CALIFORNIA,
Defendants.

COMPLAINT FOR REFUND OF TAXES

I.

Plaintiff is the widow, was the executrix under the last Will and Testament of William S. Godfrey, Jr., deceased, and his sole distributee under the Decree of Distribution in the matter of his estate.

Defendant James G. Smyth is, and at the time of the payments of Tax herein mentioned, was United States Collector of Internal Revenue at San Francisco, California.

II.

April 24, 1924, said William S. Godfrey, Jr., took out a policy of Life Insurance on his life in the New York Life Insurance Company, numbered 8 751 507, in the sum of \$15,000.00 in favor of his executors, administrators, or assigns or his duly designated beneficiary for an annual premium which he agreed to pay, and thereupon on said date said New York

Life Insurance Co., a corporation incorporated in the State of New York, made, issued and delivered to him its policy of insurance in the said sum *or* \$15,000.00 payable to his executors, administrators, or assigns.

III.

Thereafter, said William S. Godfrey, Jr., requested plaintiff, then his wife and now his widow, to consent to the erection of a trust agreement in the proceeds of said policy, and plaintiff agreed to do so on the sole condition and consideration said William S. Godfrey, Jr., would agree to and would keep up said policy and always keep it alive intact and in full force and effect, according to its terms, for the benefit and protection of plaintiff and her two minor children, and, in consideration of her said agreement, said William S. Godfrey, Jr., agreed that, if she would consent to said trust agreement and enter into the same, he would always keep up said policy intact for the benefit and protection of plaintiff and her said children.

IV.

Thereafter, on June 5, 1924, said William S. Godfrey, Jr. (with the consent of plaintiff, and pursuant to his said agreement with plaintiff), entered into a trust agreement with said insurance company by the terms whereof said company agreed to receive, as trustee, the proceeds of said policy and agreed to pay one-half the proceeds and interest thereon, as per the terms of said agreement, to plaintiff, the first beneficiary, if living, in monthly

installments of \$50.00 each and, if plaintiff should die before the said insured, to pay the said one-half or proceeds to the daughter of plaintiff, but if both of said beneficiaries died, then the money should be paid to the executors, administrators of the last surviving beneficiary.

V.

And pursuant to his said agreement with the plaintiff the said William S. Godfrey, Jr., insured, made a similar contract with said insurance company, whereby he appointed said insurance company trustee of the other half of the proceeds of said policy, and said company agreed to receive, as trustee, from itself as insurer, one-half of the proceeds of said policy, and to pay one-half of the proceeds and the interest thereon to plaintiff, as beneficiary, in monthly installments of \$50.00 each, and, in the event of the death of plaintiff before the insured, to pay the said one-half or its proceeds to the son of plaintiff, and in the event of the death of both plaintiff and her said son, to pay one-half of the proceeds to the executors or administrators of the last surviving beneficiary.

VI.

Said insured always did keep said policy alive, intact and paid up for the protection of plaintiff and her children and paid the annual premiums thereon until he became disabled in 1937, after which the premiums were, by the terms of the policy, waived.

VII.

December 21, 1929, the said William S. Godfrey, Jr., as insured, took out a further policy of life insurance with said New York Life Ins. Co. numbered 10-899-287 in the sum of \$25,000.00, payable to the executors, administrators, or assigns of the insured or his duly designated beneficiary, for an annual premium which said insured agreed to pay.

On December 21, 1929, pursuant to said contract, said insurance company, made, executed and delivered to William S. Godfrey, Jr., said insured, its policy of life insurance on the life of said William S. Godfrey, Jr., in said sum of \$25,000.00 payable to the executors, administrators, or assigns, or his duly designated beneficiary.

VIII.

On February 24, 1930, said insured requested plaintiff to consent to his entering into a trust agreement with the said insurance company in the proceeds of said policy, and plaintiff contended that he might enter into said trust agreement on the sole condition and consideration that he would agree always to keep and maintain said policy intact for the benefit and protection of plaintiff and her two children, and said insured then and there agreed with plaintiff that, in consideration of her consenting to erection of said trust agreement, he would always keep said policy up intact for the benefit and protection of the plaintiff and her said two children.

IX.

Thereafter on said date, said insured did enter into such trust agreement with said insurance company by the terms whereof the insurance company agreed to receive one-half of the proceeds of said policy as trustee and to pay the funds so held and the interest credited thereon, to plaintiff, as first beneficiary, at the rate of \$100.00 per month, and in case of the death of plaintiff to pay the balance of said fund, in like manner, to the daughter of plaintiff, and, in the event of the death of both plaintiff and her said daughter, to the executors or administrators of the last surviving beneficiary.

X.

And in like manner, on said date, said insured and said insurance company entered into a similar agreement as to the other half of the proceeds of said policy, whereby said insurance company agreed to receive the other half of the proceeds of said insurance as trustee, and to pay the same over to plaintiff, as beneficiary, in monthly installments of \$100.00 and in the event of plaintiff's death prior to the insured to pay to said fund or any balance thereof, to the son of plaintiff, if living, and if both plaintiff and said son die, then to the executors or administrators of the last surviving beneficiary.

All of said agreements operated to transfer to plaintiff and her children the whole beneficial interest in said policies.

XI.

Pursuant to his said agreement, said insured kept up and maintained said policy intact and in full force and effect, paying all premiums thereon, until he became disabled in 1937, when, pursuant to the terms of said policy, said premiums were thereafter waived.

XII.

In 1937, William S. Godfrey, Jr., became disabled and plaintiff took out letters of Guardianship upon his person and estate. Thereafter, no premiums were paid, and under the terms of said contract no premiums should be paid. Said disability continued until the death of said insured.

XIII.

November 6, 1944, William S. Godfrey, Jr., the said insured, died, testate. Thereafter such proceedings were had in the matter of his estate, that his will was admitted to probate and plaintiff was appointed executrix thereof, duly qualified as such, and ever since and up to Final Distribution and her discharge, remained the duly appointed, qualified, and acting executrix of his said last will.

By the terms of his last will, said insured left all his property, of every kind and character to plaintiff, and pursuant thereto all of said estate was duly distributed to plaintiff by Decree of Final Distribution.

XIV.

Plaintiff, as executrix of aforesaid, duly returned to the said Collector of Internal Revenue of the

United States of America the estate tax return on the estate of said insured and said return showed due to the U. S. Government by way of Estate Tax the sum of \$10,786.15, and on June 13, 1945, plaintiff, as executrix, paid said sum to the said James G. Smyth, Collector of Internal Revenue of the United States of America. Thereafter, such proceedings were had in the matter of said estate, that on July 30, 1945, the Superior Court of California, for the City and County of San Francisco, made its Decree of Settlement of First and Final Account and of Final Distribution in the matter of the estate of said insured, by the terms whereof the entire estate of said insured was distributed to plaintiff and plaintiff, ever since has been, and now is, the sole owner thereof, including the claim for refund of Estate Tax here sued for.

Thereafter, the said court, the court in which the probate of said estate depended, made its order discharging plaintiff as executrix of said last will of said insured, and said proceedings in the matter of said estate came to an end.

XV.

On November 14, 1945, F. M. Harless, United States Internal Revenue Agent in charge in San Francisco, California, made to plaintiff his report of examination of the estate tax return of the said estate, indicating a deficiency \$4,290.76 in said estate taxes, and fixing the claimed correct tax liability at \$15,076.91 and on said date, plaintiff received from said Collector of Internal Revenue a notice of defi-

ciency in the sum of \$4,290.76, and on November 27, 1945, plaintiff forthwith paid to said James G. Smyth, said Collector of Internal Revenue, the amount of said deficiency, under protest, first, because 50% of the community property, to wit, the entire estate, should have been deducted; secondly, as to the \$40,000.00 of insurance, the said policy 8-751-507 for \$15,000.00 was covered by the said two trust agreements, and said policy No. 10-899-287, for \$25,000.00 was likewise covered by said trust agreement.

XVI.

Immediately after payment of said deficiency, plaintiff filed with said Collector of Internal Revenue her claim for refund as to said taxes, and said claim for refund was referred to the Auditing Department and the Technical Staff of the Internal Revenue Department of the United States, and on August 26, 1947, said claim for refund was denied and rejected in its entirety.

XVII.

By reason of wrongful inclusion of the proceeds of said two insurance policies, the amount of the correct tax liability of said estate was not the sum of \$15,076.91 as stated in the said report of said Collector, and there was no deficiency due said Collector, but the correct amount of said tax was only \$4988.01 and the sum paid said collector in excess of the proper amount of said tax was the sum of \$10,088.90, and there is now due, owing, and unpaid from the United States of America to plaintiff the

said sum of \$10,088.90, no part of which has been paid.

Wherefore, plaintiff, waiving the excess of said sum of \$10,088.90 over the sum of \$10,000.00, to wit, the sum of \$88.90, and interest on said excess payments, prays judgment against defendant and each of them, for the said sum of \$10,000 for refund of her said illegally collected taxes and for her costs of suit.

/s/ I. M. PECKHAM,
Attorney for Plaintiff.

United States of America,
State of California,
Northern District of California—ss.

Louise K. Godfrey, being duly sworn, deposes and says:

That she is the plaintiff in the above-entitled action; that she has read the foregoing complaint and knows the contents thereof; that the same is true of her own knowledge, excepting as to the matters therein stated on her information and belief and as to those matters that she believes it to be true.

/s/ LOUISE K. GODFREY.

Subscribed and sworn to before me this 16th day of September, 1947.

[Seal] /s/ LOUIS WIENER,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed Sept. 17, 1947.

[Title of District Court and Cause.]

ORDER AMENDING COMPLAINT ON ITS
FACE

The plaintiff, having dismissed the above-entitled action as to defendant United States of America, and the plaintiff having in her original Complaint waived the excess of the claimed over-payment and interest thereon in excess of \$10,000.00, but solely for the purpose of retaining jurisdiction of said Complaint in this Court, and there now being no reason therefor, on application of the plaintiff,

It Is Ordered that the Complaint on file in the above-entitled action be and it hereby is amended so that the prayer for relief may read:

“Wherefore, plaintiff prays judgment against defendant James G. Smyth, United States Collector of Internal Revenue at San Francisco, California, for the said sum of \$10,088.90 for refund of her said illegally collected taxes, for interest on said excess payments, for her costs of suit, and for such other and further relief as to the court seems meet.”

Done in Open Court this 25th day of November, 1947.

/s/ LOUIS E. GOODMAN,
Judge of Said District Court.

[Endorsed]: Filed Nov. 25, 1947.

[Title of District Court and Cause.]

DISMISSAL AS TO DEFENDANT UNITED
STATES OF AMERICA

To the Clerk of the above-entitled Court:

The above-entitled action is hereby dismissed as to defendant United States of America, and you are instructed to enter such dismissal of record and this will be your authority for so doing.

/s/ I. M. PECKHAM,

Attorney for Plaintiff.

[Endorsed]: Filed Nov. 25, 1947.

In the District Court of the United States for the
Northern District of California, Southern Di-
vision

Civil Action No. 27659-G

LOUISE K. GODFREY,

Plaintiff,

vs.

JAMES G. SMYTH, UNITED STATES COL-
LECTOR OF INTERNAL REVENUE, at
SAN FRANCISCO, CALIFORNIA,

Defendant.

ANSWER

The defendant, James G. Smyth, through his attorney, Frank J. Hennessy, United States Attorney for the Northern District of California, answering the complaint:

I.

Admits the allegations of paragraph numbered I thereof.

II.

Admits that on April 24, 1924, William S. Godfrey, Jr., took out a policy of life insurance on his life with the New York Life Insurance Company, numbered 8751507, in the sum of \$15,000 in favor of his executors, administrators, or assigns or his duly designated beneficiary for an annual premium which he agreed to pay, and that thereupon the said Life Insurance Company issued and delivered to him its policy of insurance in the sum of \$15,000, but for lack of any information or knowledge sufficient to form a belief as to the truth of the remaining allegations of paragraph numbered II thereof, the defendant denies the same.

III.

For lack of any information or knowledge sufficient to form a belief as to the truth of the allegations contained in paragraph numbered III thereof, the defendant denies the same.

IV.

Answering the allegations of paragraphs numbered IV and V thereof, the defendant admits that on June 5, 1924, William S. Godfrey, Jr., with the consent of the plaintiff, entered into so-called trust agreements whose terms speak for themselves, but for lack of any information or knowledge sufficient to form a belief as to the truth of the remain-

ing allegations of said paragraphs numbered IV and V, the defendant denies the same.

V.

Admits that the insured always did keep the said policy alive and paid up until he became disabled in 1937 after which the premiums were, by the terms of the policy, waived, but for lack of any information or knowledge sufficient to form a belief as to the truth of the remaining allegations of paragraph numbered VI thereof, the defendant denies the same.

VI.

Admits the allegations of paragraph numbered VII thereof.

VII.

For lack of any information or knowledge sufficient to form a belief as to the truth of the allegations of paragraph numbered VIII thereof, the defendant denies the same.

VIII.

Answering the allegations of paragraphs numbered IX and X thereof, the defendant admits that the said insured entered into so-called trust agreements whose terms speak for themselves with the said Insurance Company but for lack of any information or knowledge sufficient to form a belief as to the truth of the remaining allegations of paragraphs numbered IX and X thereof, the defendant denies the same.

IX.

Admits that the said insured kept up and maintained said policy numbered 10899287 in full force and effect, paying all premiums thereof, until he became disabled in 1937, when, pursuant to the terms of said policy, said premiums were thereafter waived, but for lack of any information or knowledge sufficient to form a belief as to the truth of the remaining allegations of paragraph numbered XI thereof, the defendant denies the same.

X.

Defendant admits the allegations of paragraph numbered XII thereof.

XI.

Defendant admits the first sentence of paragraph numbered XIII thereof, but for lack of any information or knowledge sufficient to form a belief as to the truth of the remaining allegations of said paragraph numbered XIII thereof, the defendant denies the same.

XII.

Defendant admits the first sentence of paragraph numbered XIV thereof, but for lack of any information or knowledge sufficient to form a belief as to the truth of the remaining allegations of paragraph numbered XIV thereof, the defendant denies the same.

XIII.

Admits that F. M. Harless, United States Internal Revenue Agent in Charge in San Francisco, California, made to the plaintiff his report of the

examination of the estate tax return of the said estate, which report indicated a deficiency of \$4,290.76 in estate taxes and fixed a claim correct tax liability of \$15,076.91, and that on November 27, 1945, the plaintiff paid the said deficiency of \$4,290.76 to the defendant under protest, but for lack of any information or knowledge sufficient to form a belief as to the truth of the remaining allegations of paragraph numbered XV thereof, the defendant denies the same.

XIV.

Admits the allegations of paragraph numbered XVI thereof.

XV.

Denies the allegations of paragraph numbered XVII thereof.

Wherefore, the defendant prays for judgment dismissing the complaint together with the costs and disbursements of this action.

/s/ FRANK J. HENNESSY,
United States Attorney.

[Endorsed]: Filed Dec. 16, 1947.

[Title of District Court and Cause.]

DEMAND FOR JURY TRIAL

To the Clerk of the above-entitled court and to defendant above-named and Hon. Frank J. Hennessy, United States Attorney, as his attorney:

Leave of the court first had and obtained, plaintiff files this demand for a jury trial of the issues in the above-entitled action.

/s/ I. M. PECKHAM,
Attorney for Plaintiff.

Copy received January 12, 1948.

/s/ FRANK J. HENNESSY,
United States Attorney.

District Court of the United States, Northern
District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Monday, the 26th day of January, in the year of our Lord one thousand nine hundred and forty-eight.

Present: The Honorable Louis E. Goodman,
District Judge.

[Title of Cause.]

**ORDER DENYING MOTION FOR TRIAL BY
JURY**

This case came on regularly this day for hearing on motion for trial by jury. After hearing Messrs. Peckham and Licking, attorneys herein, it is Ordered that said motion be denied.

[Endorsed]: Filed Jan. 12, 1948.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled action came on regularly for trial before the court, sitting without a jury, at San Francisco, California, the Honorable Dal M. Lemmon, Judge, presiding, the plaintiff appearing by I. M. Peckham, Esq., her attorney, and the defendant James G. Smyth, appearing by Hon. Frank J. Hennessy, United States Attorney for the Northern District of California, and Honorable W. E. Licking, Assistant United States Attorney for said District, his attorneys, and evidence both oral and documentary was introduced and briefs filed on behalf of the parties, and the court having considered the evidence introduced and the briefs submitted therefrom, makes the following:

Findings of Fact

I.

Plaintiff is the widow, was the executrix under the last Will and Testament of William S. Godfrey, Jr., deceased, and his sole distributee under the Decree of Distribution in the matter of his estate.

Defendant James G. Smyth is, and at the time of the payments of Tax herein mentioned was United States Collector of Internal Revenue at San Francisco, California.

II.

April 24, 1924, said William S. Godfrey, Jr., took out a policy of life insurance on his life in the New York Life Insurance Company, numbered 8 751 507, in the sum of \$15,000 in favor of his executors, administrators, or assigns or his duly designated beneficiary for an annual premium which he agreed to pay, and thereupon on said date said New York Life Insurance Co., a corporation, incorporated in the state of New York, made, issued and delivered to him its policy of insurance in the said sum of \$15,000 payable to his executors, administrators, or assigns.

III.

Referring to the allegations of paragraph III of plaintiff's complaint, it is true that subsequent to the issuance of the policy No 8 751 507 on April 24, 1924, decedent William S. Godfrey, Jr., requested plaintiff, then his wife and now his widow, to consent to the execution of a trust agreement in the proceeds of said policy mentioned in paragraph IV of plaintiff's complaint, and plaintiff stated that she would do so and said decedent, William S. Godfrey, Jr., stated that he would always keep up said policy intact for the benefit and protection of plaintiff and her children. That at and before the signing by her of the consent to the trust agreement mentioned in plaintiff's complaint, Mr. Godfrey stated to Mrs. Godfrey that he would see that the premium payments would be kept up and that she and the children would be the beneficiaries in the manner subsequently effected by the trust agreements.

That at the time said discussion took place, the greatest bond of affection and confidence existed between the insured and his wife. By the creation of the trust, the insured was seeking to make the best possible provision for his wife and his children. The trust had the effect of making the wife and children beneficiaries and of conserving the funds all for their benefit. But the court does not conclude that a contract existed or that this destroyed the community character of the property. That neither William S. Godfrey, Jr., nor plaintiff intended thereby to enter into a contract and neither statement was made as a condition to or because of a statement or promise by the party to whom it was made. It is not true that there was thereby transferred to plaintiff and her children the whole beneficial interest in said policy or that the community character of the property of the insured and his wife in said policy was destroyed.

IV.

Thereafter, on June 5, 1924, said William S. Godfrey, Jr., entered into a trust agreement with said insurance company by the terms whereof said company agreed to receive, as trustee, the proceeds of said policy and agreed to pay one-half the proceeds and interest thereon, to plaintiff, the first beneficiary, if living, in monthly installments of \$50 each and, if plaintiff should die before the said insured, to pay the said one-half or proceeds to the daughter of plaintiff, but if both of said beneficiaries died,

then the money should be paid to the executors or administrators of the last surviving beneficiary.

V.

The said William S. Godfrey, Jr., insured, made a similar contract with said insurance company, whereby he appointed said insurance company trustee of the other half of the proceeds of said policy, and said company agreed to receive, as trustee, from itself as insurer, one-half of the proceeds of said policy, and to pay one-half of the proceeds and the interest thereon to plaintiff, as beneficiary, in monthly installments of \$50 each, and, in the event of the death of plaintiff before the insured, to pay the said one-half or its proceeds to the son of plaintiff, and in the event of the death of both plaintiff and her said son, to pay one-half of the proceeds to the executors or administrators of the last surviving beneficiary.

VI.

Said insured always did keep said policy alive, intact and paid up for the protection of plaintiff and her children and paid the annual premiums thereon until he became disabled in 1937, after which the premiums were, by the terms of the policy, waived.

VII.

December 21, 1929, the said William S. Godfrey, Jr., as insured, took out a further policy of life insurance with said New York Life Ins. Co. numbered 10 899 287 in the sum of \$25,000, payable

to the executors, administrators or assigns of the insured or his duly designated beneficiary, for an annual premium which said insured agreed to pay.

On December 21, 1929, pursuant to said contract, said insurance company made, executed and delivered to William S. Godfrey, Jr., said insured, its policy of life insurance on the life of said William S. Godfrey, Jr., in said sum of \$25,000 payable to the executors, administrators, or assigns, or his duly designated beneficiary.

VIII.

Referring to the allegations of paragraph VIII of said complaint, it is true that on February 24, 1930, insured requested plaintiff to consent to his entering into the trust agreement with the insurance company in the proceeds of policy No. 10 899 287 and that plaintiff stated that he might enter into such trust agreement and insured stated to plaintiff that he would keep up said policy intact and in full force and effect for the benefit and protection of plaintiff and her children, and said insured then and there stated to plaintiff that he would see that the premium payments would be kept up and that she and the children would be the beneficiaries in the manner subsequently effected by the trust agreements, but the court does not conclude that a contract existed or that this destroyed the community character of the property. That neither William S. Godfrey, Jr., nor plaintiff intended thereby to enter into a contract and neither statement was made as a condition to or because of a statement or prom-

ise by the party to whom it was made. It is not true that there was thereby transferred to plaintiff and her children the whole beneficial interest in said policy or that the community character of the property of the insured and his wife in said policies was destroyed.

IX.

Thereafter on said date, said insured did enter into such trust agreement with said insurance company by the terms whereof the insurance company agreed to receive one-half of the proceeds of said policy as trustee and to pay the funds so held and the interest credited thereon, to plaintiff, as first beneficiary, at the rate of \$100 per month, and in case of the death of plaintiff to pay the balance of said fund, in like manner, to the daughter of plaintiff, and, in the event of the death of both plaintiff and her said daughter, to the executors or administrators of the last surviving beneficiary.

X.

And in like manner, on said date, said insured and said insurance company entered into a similar agreement as to the other half of the proceeds of said policy, whereby said insurance company agreed to receive the other half of the proceeds of said insurance as trustee, and to pay the same over to plaintiff, as beneficiary, in monthly installments of \$100 and in the event of plaintiff's death prior to the insured to pay the said fund or any balance thereof, to the son of plaintiff, if living, and if both plaintiff and said son die, then to the execu-

tors or administrators of the last surviving beneficiary.

XI.

Said insured kept up and maintained said policy intact and in full force and effect, paying all premiums thereon, until he became disabled in 1937, when pursuant to the terms of said policy, said premiums were thereafter waived.

XII.

In 1937, William S. Godfrey, Jr., became disabled and plaintiff took out letters of Guardianship upon his person and estate. Thereafter, no premiums were paid, and under the terms of said contract no premiums should be paid. Said disability continued until the death of said deceased.

XIII.

November 6, 1944, William S. Godfrey, Jr., the said insured, died, testate. Thereafter such proceedings were had in the matter of his estate, that his will was admitted to probate and plaintiff was appointed executrix thereof, duly qualified as such, and ever since and up to Final Distribution and her discharge, remained the duly appointed, qualified and acting executrix of his said last Will.

By the terms of his last Will, said insured left all his property, of every kind and character to plaintiff, and pursuant thereto all of said estate was duly distributed to plaintiff by Decree of Final Distribution.

XIV.

Plaintiff, as executrix of aforesaid, returned to the said Collector of Internal Revenue of the United States of America the estate tax return on the estate of said insured and said return showed due to the U. S. Government by way of Estate Tax the sum of \$10,786.15, and on June 13, 1945, plaintiff, as executrix, paid said sum to the said James G. Smyth, Collector of Internal Revenue of the United States of America. Thereafter, such proceeding were had in the matter of said estate, that on July 30, 1945, the Superior Court of California, for the City and County of San Francisco, made its Decree of Settlement of First and Final Account and of Final Distribution in the matter of the estate of said insured, by the terms whereof the entire estate of said insured was distributed to plaintiff and plaintiff ever since has been, and now is, the sole owner thereof, including the claim for refund of Estate Tax here sued for.

Thereafter, the said court, the court in which the probate of said estate depended, made its order discharging plaintiff as executrix of said last Will of said insured, and said proceedings in the matter of said estate came to an end.

XV.

On November 14, 1945, F. M. Harless, United States Internal Revenue Agent in charge in San Francisco, California, made to plaintiff his report of examination of the estate tax return of the said estate, indicating a deficiency of \$4,290.76 in said

estate taxes, and fixing the claimed correct tax liability at \$15,076.91 and on said date, plaintiff received from said Collector of Internal Revenue a notice of deficiency in the sum of \$4,290.76, and on November 27, 1945, plaintiff forthwith paid to said James G. Smyth, said Collector of Internal Revenue, the amount of said deficiency, under protest, first, because 50% of the community property, to wit, the entire estate, should have been deducted; secondly, as to the \$40,000 of insurance, the said policy 8 751 507 for \$15,000 was covered by the said two trust agreements, and said policy No. 10 899 287 for \$25,000 was likewise covered by said trust agreement.

XVI.

Immediately after payment of said deficiency, plaintiff filed with said Collector of Internal Revenue her claim for refund as to said taxes, and said claim for refund was referred to the Auditing Department and the Technical Staff of the Internal Revenue Department of the United States, and on August 26, 1947, said claim for refund was denied and rejected in its entirety.

XVII.

It is not true that by reason of inclusion of the proceeds of said two insurance policies the amount of the correct tax liability of said estate was not the sum of \$15,067.91, as stated in the report of the defendant collector; it is not true that there was no deficiency due said collector or that the total

amount of said tax was only \$4988.01, or that the sum paid such collector is in excess of the proper amount of said tax was or is the sum of \$10,088.90, or that there is now due, owing or unpaid from the United States of America to plaintiff the said sum of \$10,088.90, or any part thereof.

XVIII.

It is true that said policy No. 8751507 on the life of the insured provided that the insured might change the beneficiaries upon written notice to the home office of the insurer. In the event all beneficiaries should predecease the insured, the interest of the beneficiary was to vest in the insured.

Each trust in one-half the proceeds of said policy provides that the trustee should receive from itself as insurer one-half of the proceeds of said policy in case it should become a claim because of the insured's death. Each trust named plaintiff as first beneficiary of the trust, and in the event of her death, the proceeds of the trust were to be paid in equal parts to the two children of insured and plaintiff. It is true that each trust provided that it should become null and void if (a) the grantor revoked the appointment by written notice to the trustee; (b) the grantor should survive both beneficiaries; (c) if any change were made in the beneficiary or manner of payment of the proceeds of said policy; (d) if the policy should be surrendered for its cash surrender value; (e) if the net sum available under the policy at the time of the insured's

death should be less than; and (f) if the insured should assign the policy.

XIX.

As to policy No. 10 899 287, the policy did not provide on its face that insured might change the beneficiary in the manner provided in the policy. As to change of beneficiary Policy No. 10 899 287 reads:

New York Life Insurance Company, a mutual company, agrees to pay to the executors, administrators or assigns of the insured, or to the duly designated beneficiary (with right on the part of the insured to change beneficiary in the manner provided herein). Twenty-five thousand (\$25,000.00) dollars (the face of this policy), etc.

The only other reference to change of beneficiary in the policy was a ruled space at the end of its schedules labeled:

REGISTER OF CHANGE OF BENEFICIARY
NOTE—No change of beneficiary shall take effect unless indorsed
on this Policy by the Company at the Home Office.

Date of Request	Beneficiary	Indorsed by
On the 24th day of February, 1930, the New York Life Insurance Com- pany was appointed trustee as per conditions of trust agreements (2) at- tached hereto.		John C. McCarthy, Vice President

XX.

It is true that plaintiff married decedent insured September 4, 1916. They had two children, both still living. Plaintiff and insured resided and made

their home in this district from their marriage to the death of insured November 6, 1944. All premiums of said policies were paid with the community earnings of the insured and plaintiff.

Conclusions of Law

From the foregoing Findings of Fact, the court concludes as a matter of law:

I.

That decedent insured retained the right until his death in conjunction with plaintiff, his wife, to designate the persons who should possess or enjoy New York Life Policies 8 751 507 and 10 899 287 or the proceeds thereof.

II.

The insured, as manager of the community of himself and plaintiff, at his death possessed incidents of ownership in said policies within the meaning and intent of Section 811 (g) of the Internal Revenue Code as amended by Section 404 of the Revenue Act of 1942.

III.

That defendant as collector and the Commissioner of Internal Revenue properly included \$40,000.00, representing the proceeds of said policies, in the estate of said insured for Federal Estate Tax purposes.

IV.

Plaintiff did not over-pay the Federal Estate Taxes on the estate of said insured.

V.

There was no over-payment of the Federal Estate Tax on the Estate of William S. Godfrey, Jr., deceased.

VI.

Defendant is entitled to judgment against plaintiff for his costs to be taxed.

Let judgment be entered accordingly.

Dated: January 21st, 1949.

/s/ DAL M. LEMMON,
U. S. District Judge.

[Endorsed]: Filed Jan. 21, 1949.

District Court of the United States, Northern
District of California, Southern Division

No. 27,659-G

LOUISE K. GODFREY,

Plaintiff,

vs.

JAMES G. SMYTH, UNITED STATES COLLECTOR OF INTERNAL REVENUE, at SAN FRANCISCO, CALIFORNIA,

Defendant.

JUDGMENT

The above-entitled action came on for trial before the Court, sitting without a jury at San Francisco,

California, the Honorable Dal M. Lemmon, Judge, presiding, and the plaintiff appearing by I. M. Peckham, her attorney, and the defendant, James G. Smyth, appearing by Frank J. Hennessy, United States Attorney for the Northern District of California, and W. E. Licking, Assistant United States Attorney for said District, his attorneys, and evidence, both oral and documentary, was introduced by and briefs filed on behalf of the respective parties and the Court having considered the evidence introduced and the briefs submitted and the Court having made its Findings of Fact and Conclusions of Law herein, it is hereby ordered, adjudged and decreed that the plaintiff take nothing by this action and that the defendant have judgment against the plaintiff for his costs to be taxed in the sum of \$

Dated: This 21st day of January, 194..

/s/ DAL M. LEMMON,
District Judge.

Approved as to form as provided in Rule 5(d).

/s/ I. M. PECKHAM,
Attorney for Plaintiff.

Entered in Civil Docket Jan. 24, 1949.

Lodged 12-1-48.

[Endorsed]: Filed Jan. 21, 1949.

District Court of the United States, Northern
District of California, Southern Division

No. 27,659-G

GODFREY,

vs.

SMYTH, U. S. COLL. INTERNAL REVENUE.

NOTICE

To: I. M. Peckham, Esq., 405 Montgomery St.,
Room 1124, San Francisco, Calif.; Frank J.
Hennessy, Esq., P. O. Building, San Francisco,
Calif.

You Are Hereby Notified that on January 24,
1949, a Decree Judgment was entered of record in
this office in the above-entitled case.

C. W. CALBREATH,
Clerk, U. S. District Court.
fj

[Title of District Court and Cause.]

Notice of Motion and Motion to Amend Finding
and Judgment or, in the Alternative, to Va-
cate the Decision and Judgment and for a New
Trial

To the Honorable the above-entitled Court, the
Clerk thereof, to Honorable James G. Smyth,
United States Collector of Internal Revenue,
Defendant, and to Honorable Frank J. Hen-
nessy, U. S. Attorney, Attorney for Defend-
ant:

Notice is given that on February 14, 1949, at the hour of 10:00 o'clock a.m. of said day, or as soon thereafter as counsel can be heard, at the Court Room of the above-entitled Court, in the Post Office Building in the City and County of San Francisco, State and Northern District of California, plaintiff will, and hereby does, move the above-entitled court for its order, in the alternative, setting aside Findings Number III, VIII and XVII and Conclusions of Law Number I to VI, inclusive, and to vacate the judgment made and entered in said cause on January 24, 1949, and, to make in lieu thereof, the annexed Findings Number III, VIII, XA and XVII and Conclusions of Law Number I to VI, inclusive, and to enter in lieu of said judgment an opposite and contrary judgment.

Forms of said Order, Findings, Conclusions of Law, and Judgment are hereunto annexed and served and filed herewith.

Or, in the alternative, to vacate and set aside said Findings of Fact and Conclusions of Law and Judgment and to grant to plaintiff a new trial of the issues embraced within said Findings. A copy of our proposed order granting new trial is hereunto annexed and served and filed herewith.

Said motions will be made on the ground that said Findings of Fact and Conclusions of Law and Judgment made herein are:

1. The decision is contrary to the law in the case.

2. The decision is contrary to the evidence in the case.
3. The decision and judgment are contrary to the law and the evidence in the case.
4. The evidence is insufficient to support the decision.
5. The evidence is insufficient to support the decision and judgment.
6. The decision is against the weight of and contrary to the evidence, and that the evidence herein compels contrary Findings, Conclusions and Judgment.
7. The decision and judgment are contrary to and against law.
8. The evidence shows that a decision and judgment should have been rendered in favor of plaintiff, and that the decision and judgment, as rendered, are contrary to law, and will be based on this notice, the minutes of the court, the record of the evidence herein, on the said Findings, Conclusions and Judgment made herein, and on all the records, papers, pleadings and files in the above-entitled action.

/s/ I. M. PECKHAM,
Attorney for Plaintiff.

Copy received February 1st, 1949.

FRANK J. HENNESSY,
U. S. Attorney.

By /s/ E. ELMER COLLETT,
Attorney for Defendant.

[Title of District Court and Cause.]

**ORDER VACATING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND JUDG-
MENT AND AMENDING FINDINGS OF
FACT, CONCLUSIONS OF LAW AND
JUDGMENT**

Plaintiff Louise K. Godfrey, having duly served and filed her motion to amend Findings of Fact and Judgment herein, and said motion having come on duly and regularly to be heard, both parties appearing on said hearing, and the matters having been heard and submitted to the court, and the court having considered the same, and being advised in the premises;

It Is Ordered, Adjudged and Decreed that Findings of Fact Number III, VIII and XVII and Conclusions of Law Number I to VI, inclusive, and the judgment made and entered in this cause on January 24, 1949, be and they hereby are vacated and set aside and in lieu thereof the court makes the Findings of Fact and Conclusions of Law in the form hereunto annexed, and directs the entry of an opposite and contrary judgment in accordance with the form of judgment hereunto annexed.

.....,
Judge of the U. S. District
Court.

[Title of District Court and Cause.]

AMENDMENT TO FINDINGS OF FACT AND
CONCLUSIONS OF LAW

The motion of plaintiff to amend the Findings of Fact and Conclusions of Law and Judgment in the above-entitled action, having come on regularly for hearing, plaintiff and defendant appearing by their respective counsel, said motion having been granted, the court now finds in lieu of Findings Number III, VIII and XVII heretofore made, the following Findings of Fact:

III.

Subsequent to the issuance of policy 8 751 507 on April 24, 1924, said William S. Godfrey, Jr., decedent and insured, requested the plaintiff, then his wife and now his widow, to consent to the execution of a trust agreement in the proceeds of said policy, and plaintiff agreed to do so on the sole condition and consideration that William S. Godfrey, Jr., would agree to and would keep up said policy and always keep it alive, intact and in full force and effect according to its terms for the benefit and protection of plaintiff and her two minor children, and in connection with her said agreement said William S. Godfrey, Jr., agreed that if she would consent to said trust agreement and enter into the same, he would always keep up said policy intact for the benefit and protection of plaintiff and her children.

VIII.

It is true that on February 24, 1930, said insured requested plaintiff to consent to his entering into a trust agreement with said insurance company in the proceeds of said policy No. 10 899 287, and plaintiff thereupon consented that he might enter into said trust agreement on the sole condition and consideration that he would agree always to keep and maintain said policy intact for the benefit and protection of plaintiff and her two children, and said insured then and there agreed with plaintiff that in consideration of her consenting to the erection of said trust agreement, he would always keep said policy up, and intact for the benefit and protection of plaintiff and her said two children.

XA.

The trust agreements of February 24, 1930, covering said Policies No. 8 751 507 in the sum of \$15,000.00 and No. 10 899 287 in the sum of \$25,000.00 operated to transfer to plaintiff and her children the whole beneficial interest in said policies No. 8 751 507 and No. 10 899 287.

XVII.

By reason of the wrongful inclusion of the proceeds of said two insurance policies, the amount of the correct tax liability of said estate was not the sum of \$15,076.91 as stated in the said report of said Collector and there was no deficiency due said Collector, but the correct amount of said tax was only \$4988.01 and the sums paid said Collector in excess

of the proper amount of said tax was the sum of \$10,088.91, or thereabouts, and there is now due, owing and unpaid from the United States of America to Plaintiff the said sum of \$10,088.90, no part of which has been paid.

Conclusions of Law

From the foregoing Findings of Fact as from all facts previously found, the court concludes as a matter of law:

I.

That decedent insured did not retain the right until his death in conjunction with plaintiff, his wife, to designate the persons who should possess or enjoy New York Life Policies No. 8 751 507 and 10 899 287 or the proceeds thereof.

II.

The insured, as manager of the community of himself and plaintiff, at his death did not possess incidents of ownership in said policies within the meaning and intent of Section 811 (g) of the Internal Revenue Code, as amended by Section 404 of the Revenue Act of 1942.

III.

That defendant, as Collector, and the Commissioner of Internal Revenue improperly included \$40,000.00 representing the proceeds of said policies in the estate of said insured for Federal Estate Tax purposes.

IV.

Plaintiff overpaid the Federal Estate Tax on the estate of said insured in the sum of approximately \$10,088.90.

V.

There was overpayment of the Federal Estate Tax on the estate of William S. Godfrey, Deceased, in said sum of \$10,088.90.

VI.

Plaintiff is entitled to judgment against defendant for said sum of \$10,088.90 and for her costs of suit to be taxed. The tax liability in the estate of Godfrey is re-referred to the Treasury Department to determine the exact amount of liability in accordance with these Findings and Conclusions.

Whereupon, let judgment be entered accordingly in favor of plaintiff and against defendant for the said sum of \$10,088.90, or such sum as the Treasury Department certifies is due in accordance with these Findings and Conclusions.

Done in open court February , 1949.

.....,

United States District Judge.

Approved as to form as per Rule 5(d).

FRANK J. HENNESSY,
U. S. Attorney.

By /s/ E. ELMER COLLETT,
Attorney for Defendant.

In the District Court of the United States for the
Northern District of California, Southern Di-
vision

No. 28659-G

LOUISE K. GODFREY,

Plaintiff,

vs.

JAMES G. SMYTH, United State Collector of In-
ternal Revenue,

Defendant.

JUDGMENT

The above-entitled action came on for trial before the Court without a jury at San Francisco, California, Hon. Dal M. Lemmon, Judge presiding, plaintiff appearing by I. M. Peckham, her attorney, and defendant, James G. Smyth, appearing by Frank J. Hennessy, United States Attorney for the Northern District of California, and W. E. Licking, Assistant United State Attorney, his attorneys, and evidence both oral and documentary was introduced by and briefs filed on behalf of the respective parties and the Court having considered the evidence introduced and the briefs submitted, and the Court having made its Findings of Fact and Conclusions of Law herein, it is ordered, adjudged and decreed that plaintiff have and recover of and from defendant, James G. Smyth, United States Collector of Internal Revenue, the sum of \$....., together with her costs to be taxed in the sum of \$.....

Dated: , 1949.

.
U. S. District Judge.

Approved as to Form as per Rule 5(d).

FRANK J. HENNESSY,
U. S. Attorney.

By /s/ E. ELMER COLLETT,
Attorney for Defendant.

[Title of District Court and Cause.]

ORDER GRANTING A NEW TRIAL

Louise K. Godfrey having duly served and filed her motion for a new trial and said motion for a new trial having come on duly and regularly to be heard, both parties appearing on said hearing, and the matter having been heard and submitted to the court, and the court having considered the same, and being advised in the premises;

It Is Ordered, Adjudged and Decreed that Findings of Fact Number III, VIII and XVII and Conclusions of Law Number I to VI, inclusive, and judgment herein be and they are hereby vacated and set aside, and a new trial of this action is hereby granted to plaintiff on her motion on the issues embraced within Findings Number III, VIII and XVII and Conclusions of Law Number I to VI, inclusive.

Done in open court February , 1949.

.....
Judge of the U. S. District
Court.

[Endorsed]: Filed Feb. 1, 1949.

[Title of District Court and Cause.]

ORDER

Counsel for the plaintiff has been most industrious in his presentation of the pending motions. He has submitted to me two long memorandums and a summary of his argument. I know that he has sincere conviction that his position is meritorious and that the conclusion the Court has reached is faulty. My further study of the case, instead of bringing me to his way of thinking, fortifies my original conclusion. I am still of the conviction that the insurance trusts did not make Mrs. Godfrey the irrevocable beneficiary. I am still persuaded that the conversations had by the insured and his wife did not constitute an agreement.

If I were to hold contrary upon the question of the agreement my conclusion would not be altered. In California though the wife has an equal existing interest with her husband in the community property, including personal property, the husband has the control of the community personal property subject to certain restrictions with which we are not here concerned. It is probable that this control

would permit the husband to change a beneficiary designated and to borrow upon or receive the cash surrender value of a policy which is community property without the wife's consent in advance.

Each of the trust agreements provides that the trust shall become null and void "(a) if I shall revoke said appointment by written notice to said Company filed at its Home Office; (b) if both said Beneficiaries shall die before me; (c) if any change is made in the beneficiary or manner of payment of the proceeds of said policy; (d) if said policy shall be surrendered for Cash Surrender Value; (e) if I shall assign said policy and said assignment or written notice thereof be filed with the Company at its Home Office; (f) if at my death the net sum payable under said policy shall be less than Six Thousand Dollars."

The "I" referred to therein is William S. Godfrey, the insured. It is therefore quite clear that the trust agreements to which plaintiff gave written consents recognizes that Godfrey retained the right to assign the policy and to revoke the appointment, and that the right was reserved to change the beneficiary or manner of payment of proceeds and to surrender the policy for its cash value. Counsel in one of his memorandums sets forth these above quoted provisions and in pencil comments that the right to change the beneficiary or the manner of paying the proceeds, the surrender of the policy for cash value and the right to assign the policy retained by the insured is "contrary to G-s agreement." I can not understand

how this would be contrary to the agreement, assuming there was one, it is a part of the least assailable part of any agreement which might have existed. It has the solemnity of a writing. It does not depend upon the recollection of an interested party whose word may not now be disputed by any living witness to the conversation. It must be borne in mind that these trust agreements have not been attacked upon any equitable grounds. Plaintiff did not assail them either in her pleading or at the trial. As I understand Mrs. Godfrey, she stands upon the trust agreements and upon an oral understanding which she claims existed between the parties. The original negotiations merged in the writing and any verbal negotiations repugnant to the writing may not be considered. The insured did not part with all of his title to and enjoyment of the policies. He did not alienate all of his "possession or enjoyment." Spiegel's Estate v. Commissioner of Internal Revenue, 69 S. Ct. 301; Commissioner of Internal Revenue v. Church's Estate, 69 S. Ct. 322.

Plaintiff's motion to amend findings and judgment for a new trial are both denied.

Dated: May 2nd, 1949.

/s/ DAL M. LEMMON,
U. S. District Judge.

Copy mailed to Mr. Peckham and handed to Marshal.

[Endorsed]: Filed May 2, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO UNITED STATES
COURT OF APPEALS

Notice Is Hereby Given that Louise K. Godfrey, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on January 24, 1949, and from the order entered therein on May 2, 1949, denying plaintiff's motion to amend findings and judgment.

Dated, San Francisco, May 27, 1949.

/s/ I. M. PECKHAM,

Attorney for Appellant Louise
K. Godfrey.

[Endorsed]: Filed May 27, 1949.

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

In accordance with Rule 75 of the Rules of Civil Procedure plaintiff Louise K. Godfrey hereby designates all of the following parts of the record, proceedings, and evidence to be contained in the record on appeal:

1. Complaint filed September 17, 1947.
2. Order filed November 25, 1947, amending complaint on face.
3. Order filed November 25, 1947, as to dismissal of defendant United States.

4. Answer of defendant filed December 16, 1947.
5. Findings of fact and conclusions of law filed January 21, 1949.
6. Judgment filed January 21, 1949.
7. Notice of entry of judgment.
8. Notice of motion and motion to amend findings and judgment, and motion for new trial, filed February 1, 1949.
9. Order and opinion of May 2, 1949, denying motion to amend findings and judgment and denying motion for new trial.
10. Reporter's transcript of evidence and proceedings.
11. All exhibits admitted in evidence at the trial.
12. Notice of appeal filed May 27, 1949.
13. This designation.
14. Statement of points on which plaintiff intends to rely on her appeal.

Annexed hereto and served herewith is the statement of the points on which plaintiff intends to rely on her appeal.

Dated, San Francisco, June 7, 1949.

/s/ I. M. PECKHAM,

Attorney for Plaintiff and
Appellant.

Copy received this 7th day of June, 1949.

/s/ FRANK J. HENNESSY,
U. S. Attorney.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH PLAINTIFF INTENDS TO RELY ON HER APPEAL

1. The decision is contrary to the law in the case.
2. The decision is contrary to the evidence in the case.
3. The decision and judgment are contrary to the law and the evidence in the case.
4. The evidence is insufficient to support the decision.
5. The evidence is insufficient to support the decision and judgment.
6. The decision is against the weight of and contrary to the evidence, and that the evidence herein compels contrary findings, conclusions, and judgment.
7. The decision and judgment are contrary to and against law.
8. The evidence shows that a decision and judgment should have been rendered in favor of plaintiff, and that the decision and judgment, as rendered, are contrary to law.
9. The court erred in denying plaintiff's motion to amend findings and judgment.
10. The court erred in denying plaintiff's motion for new trial.

Dated, San Francisco, June 7, 1949.

/s/ I. M. PECKHAM,
Attorney for Plaintiff and
Appellant.

Copy Received this 7th day of June, 1949.

/s/ FRANK J. HENNESSY,
U. S. Attorney.

[Endorsed]: Filed June 7, 1949.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON
APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying document, listed below, are the originals filed in this Court, or a true and correct copy entered on the minutes of this Court, in the above-entitled case, and that they constitute the Record on Appeal herein, as designated by the Attorney for the Appellant:

Complaint for Refund of Taxes.

Order Amending Complaint on its Face.

Dismissal as to Defendant United States of America.

Answer.

Demand for Jury Trial.

Minute Order of January 26, 1948—Order Denying Motion for Trial by Jury.

Findings of Fact and Conclusions of Law.
Judgment.

Notice of Entry of Judgment.

Notice of Motion and Motion to Amend Findings
and Judgment, or, In the Alternative, To Vacate
The Decision And Judgment And For a New Trial.
Order.

Notice of Appeal to United States Court of Ap-
peals.

Designation of Record on Appeal and Statement
of Points on which Plaintiff Intends to Rely on
Her Appeal.

Reporter's Transcript for April 9, 1948.

Plaintiff's Exhibits Nos. A, B, C, D, E, F, G, H
and I.

In Witness Whereof, I have hereunto set my hand
and affixed the seal of said District Court, this 23rd
day of June, A.D. 1949.

C. W. CALBREATH,
Clerk,

[Seal] By /s/ M. E. VAN BUREN,
Deputy Clerk.

[Title of District Court and Cause.]

PROCEEDINGS

Friday, April 9, 1948—10:00 o'clock a.m.

The Clerk: Godfrey vs. United States.

Mr. Peckham: Ready.

The Court: You may proceed.

Mr. Peckham: If the Court please, this is an
action against the Collector of Internal Revenue for

a refund of taxes we claim were erroneously assessed to the estate of William S. Godfrey, Jr., the estate tax assessed to his widow and distributee, who was the sole distributee of his estate. The original tax was paid under protest, and we contend that these \$40,000 in insurance policies—two policies, one for fifteen and one for twenty-five, that were covered by trust agreements, were improperly included in the original tax, and primarily on the ground it was community property and the new law of 1942, which took effect before the death of the deceased, was in effect taxing the assets of a partnership on the death of one party.

That has been resolved not only as to the community property, but as to insurance itself, as to the other policies, because of the ruling in the Wiener case, Fernandez versus Wiener, which was decided while these proceedings were in fieri.

But it left us with the single claim remaining that at the time the policies were taken out and a trust settlement in the proceeds established, there was an agreement between Mr. and Mrs. Godfrey that he would keep up these policies and keep them intact for the protection of herself and the family, and that agreement prevailed as to each of the two policies, and it is our contention that upon making such an agreement with the true beneficiary that the entire interest in the policy was transferred to the beneficiary and that, therefore, he could not deal with it as his own policy. The State law is to that effect and the Federal Court has looked the same way at least on one occasion.

We got nowhere with the Department on it, and that is the reason we are bothering your Honor with it.

The Court: Mr. Peckham, is there any dispute as to the facts?

Mr. Peckham: We have eliminated most of the dispute as to the facts, your Honor.

In April of 1924, Mr. Godfrey took out a policy of life insurance on his life in the New York Life. Counsel has a copy of that, and I have a photostatic copy which I will be glad to furnish.

Mr. Licking: We have copies of the two policies and trust agreement which are in question, there is no argument about those. Those may go in evidence.

Mr. Peckham: You have copies—

Mr. Licking: I prefer your copies because they are larger—your Honor has had some experience already with those small photostatic reproductions.

We can save time on this. Those may go in evidence. There is no question but what they were the two life insurance policies and there was the trust agreement. There is equally no question but what the tax was paid under protest.

The Court: What factual issue does that leave in the case, then?

Mr. Licking: Well, there is only one, as I see it, whether there was an agreement between Mrs. Godfrey and Mr. Godfrey that Mr. Godfrey would keep the policies in effect and wouldn't change the beneficiary, and then the legal question of whether, if there was such an oral agreement, it is admissible in

evidence. The Wiener case, as your Honor remembers, held that proceeds of trust where there was power of revocation in the trustor were part of the estate. Now, these trust agreements which are introduced in evidence here under our stipulation, each contain a power to change beneficiaries or to revoke the trust. That was the reason for the assessment of the tax, and if I understand counsel's contention correctly, it is because of the oral agreement between Mrs. Godfrey and the trustor that he would keep the trust in effect and would not change the beneficiary—

Mr. Peckham: It is our contention that under that agreement, without a breach of contract, he could not change beneficiaries without her consent.

Now, I will introduce the trust agreement. May it be marked as Exhibit A—it is already marked Exhibit A—the original trust agreement and the first policy for Fifteen Thousand, Number 8,751,507, we offer as Plaintiff's Exhibit A.

(The document referred to was marked Plaintiff's Exhibit A.)

Mr. Peckham: The second trust agreement on policy number 10,899,207, the policy and the two trust agreements introduced as one exhibit, Exhibit 3.

Mr. Licking: No objection.

(The document referred to was marked Plaintiff's Exhibit B.)

Mr. Peckham: Does your Honor want to inspect them?

The Court: Not now. Hand them to the Clerk.

Mr. Peckham: Mr. Cody, you have responded here to a subpoena duces tecum and you brought the records of the New York Life, did you?

Mr. Cody: Yes.

Mr. Peckham: I don't know if we will need any of Mr. Cody's testimony or not.

Mr. Licking: Well, I have admitted the policies in evidence and the trust agreement.

Mr. Peckham: Well, take the stand, Mr. Cody, and be sworn.

JARED CODY,

called for the Plaintiff, Sworn.

Direct Examination

By Mr. Peckham:

Q. Mr. Cody, you are local representative of the New York Life Insurance Company? A. Yes.

Q. That is a New York corporation, is it?

A. Yes.

Q. And you are familiar with the records and files in the case of— A. Yes.

Q. —William S. Godfrey, Jr. You have been requested to bring that here. You have the original documents of that file? A. Yes, I have.

Q. Now, Mr. Cody, do you recall the trust agreements that were made in 1924? A. Yes.

Q. Did Mr. Godfrey keep up the policies up to the time of his disability in 1937?

(Testimony of Jared Cody.)

A. Yes, he did.

Q. And he never—during that time—the same thing was true of the 1929 policy, was it not?

A. Yes, that is right.

Q. And he always paid the premiums up to the time of disability? A. Yes.

Q. Never made any attempt during that period to change the beneficiary?

Mr. Licking: Objected to on the ground it is immaterial.

The Court: Overruled.

Mr. Peckham: You may answer the question.

A. Not that I know of, no.

Q. Never made any attempt to assign the policies? A. No, we have no record of that.

Q. At all times up to the time of his disability he kept them in full force and effect? A. Yes.

Q. By the terms of his policies, if there is disability he was no longer obligated to pay premiums?

A. That is right.

Q. And the policies remained in force up to the time of his death? A. Yes.

Q. And you have settled in accordance with the trust agreement with Mrs. Godfrey?

A. Yes, that is right.

Mr. Peckham: Any questions?

Mr. Licking: None.

The Court: That is all.

Mr. Peckham: One moment.

Q. In that regard, you have also a letter, I believe, from the New York Life Insurance Company

(Testimony of Jared Cody.)

in which they insisted on Mrs. Godfrey joining in this trust agreement?

Mr. Licking: To which I object on the ground it is immaterial whether they did or not. The trust agreements speak for themselves.

The Court: Sustained.

Mr. Peckham: It is admitted that the company insisted upon her joining in the trust agreements in these policies in issue.

The Court: You say it is admitted?

Mr. Peckham: I don't say it is admitted, I say it is our contention that it was due to the insistence of the New York Life that he approached Mrs. Godfrey and asked her to agree to these agreements.

Mr. Licking: Objected to as immaterial.

The Court: I feel it is immaterial.

Mr. Peckham: Very well, your Honor. I am sorry to have disturbed you. If your Honor will bear with me just a moment, there is quite a few allegations that are now eliminated by counsel's stipulations.

I offer as Exhibit C the State tax return in the Estate of William S. Godfrey, Jr.

Mr. Licking: No objection.

(The document referred to was marked Plaintiff's Exhibit C.)

Mr. Peckham: And that was filed with the Collector on the date it bears date.

And we offer as Plaintiff's Exhibit next in order the notice of payment of tax under protest that was filed at the same time, together with the payment

of tax, and we offer in evidence letter of December 3, 1945—do you want these as separate exhibits?

Mr. Licking: No, put them all together, put them in as they went to the Collector. I suppose they all went together, didn't they?

Mr. Peckham: No, they are all separate.

The letter of December 3rd, 1945, to the Collector, together with the claim of refund on Form 843 that went in at the same time, and then the letter of December 11, 1945, pertaining to the same matter addressed to the Collector, and then the protest of May 14, 1946, addressed to F. M. Harless, and ask that those all go in as one exhibit, Exhibit D.

Mr. Licking: Are they arranged chronologically?

Mr. Peckham: Chronologically, from the bottom up.

Mr. Licking: I have no objection.

(The documents referred to were marked Plaintiff's Exhibit D.)

EXHIBIT D

Notice of Payment of Estate Tax Under Protest
To the Honorable, the Collector of Customs of the
United States at San Francisco, California.

Re: Estate of William S. Godfrey, Jr.
S. F. Superior 97680.

Sir:

I hand you herewith duplicate of form 706, Estate Tax Return, in the above entitled estate. The Estate Tax Return shows a total tax due of \$10,786.15. This amount we are paying you herewith,

Plaintiff's Exhibit D—(Continued)
under protest, however, for the reasons which hereinafter appear:

The within return is made according to the strict tenor of the Revenue Act of 1942, and the regulations made pursuant thereto.

But the act and the regulations are unconstitutional in this, that they forbid the deduction of 50% of the community property which, under California Law adopted long prior to said act and regulations, the widow had and has a vested interest in the community property to the extent of one-half thereof; that the community property is analogous to partnership property and the attempt to measure the estate tax on the husband's half interest by the value of the interest of the surviving partner of the community, denies the surviving partner due process of law.

For another reason, the act and regulations ought not properly to apply to at least \$40,000 of the life insurance. The policy No. 8751507 of the New York Life Insurance Company for the principal sum of \$15,000.00 was issued May 9, 1924, effective April 24, 1924.

On June 5, 1924, two several trust agreements were entered into between the insured decedent and the insurer, whereby a trust was erected in the proceeds of the policy and it is our contention that thereafter the insured had no control of the policy.

On December 21, 1929, policy No. 10,699,287 was issued by said insurer to said decedent for the sum

Plaintiff's Exhibit D—(Continued)

of \$25,000.00 and on February 24, 1930, two separate trust agreements were made between the insured decedent and said insurer appropriating the proceeds of said policy in accordance with said trust agreements and thereafter the insured had no interest in said policy.

A further fact is this; That in July of 1937, the insured became incompetent from an incurable mental condition first diagnosed as schizophrenia and later determined to be dementia praecox. This condition was incurable and resulted in his total, permanent and continuing disability, in consequence of which on September 16, 1937, the Superior Court of California for San Francisco County in proceeding No. 76422, appointed a guardian for him and said guardianship continued until his death.

By the terms of each of said policies, the company waived payment of any premium due after proof of such disability and during such disability and thereafter no premiums were paid.

Photostatic copies of said policies and trust agreements are submitted herewith.

By the will of said decedent, two copies of which, one certified, are submitted herewith, all of the estate of said decedent was given to the widow, Louise K. Godfrey, the survivor of said community.

For the foregoing reasons we point out that the total sum of \$40,000.00, proceeds of said two insurance policies are not properly includable in the total taxable estate of the decedent although the strict

Plaintiff's Exhibit D—(Continued)

tenor of the Revenue Act of 1942 and the regulations thereunder require them to be included and they have been included in the said return.

For the foregoing reasons the said calculated estate tax of \$10,766.15 is paid under protest, it being the contention of the widow and executrix that there is no Federal death tax due on the above entitled estate.

Very respectfully yours,

/s/ LOUISE K. GODFREY,

Executrix of the Last Will and Testament of said decedent.

/s/ I. M. PECKHAM,

Attorney for Executrix.

December 3, 1945

The United States Collector of Internal Revenue
110 McAllister Street
San Francisco, California

Re: Estate of Godfrey

Dear Sir:

I hand you herewith claim of Mr. Louise K. Godfrey for a refund. This claim is filed with you at this time because we have just completed payment of tax and deficiency. The points that we raise are the non-includability of one-half of the community property, the non-includability of any of the insurance which was all community property and the non-includability of \$40,000.00 in insurance as to which insured and beneficiary had erected a trust

Plaintiff's Exhibit D—(Continued)

in the proceeds many years ago, all of which appears on the face of the claim. The non-includability of the wife's share of the community property is now pending before the Supreme Court of the Supreme Court of the United States for adjudication in two cases from Louisiana and Texas. I suggest that you withhold action on this claim for refund until the legal situation has been clarified by the Supreme Court decisions.

Very respectfully yours,

I. M. PECKHAM,

Attorney for Mrs. Louise K. Godfrey, widow and sole distributee of the Godfrey Estate.

IMP:cp

TREASURY DEPARTMENT
Internal Revenue Service
(Revised April 1940)

CLAIM

To be filed with the Collector where assessment was made or tax paid

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

Form 843

- Refund of Tax Illegally Collected.
- Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.
- Abatement of Tax Assessed (not applicable to estate or income taxes.)

Plaintiff's Exhibit D—(Continued)

State of California,
County of San Francisco—ss.

Name of taxpayer or purchaser of stamps: Mrs.
Louise K. Godfrey.

Business address: 405 Montgomery Street, San
Francisco, California.

Residence: 232 Mallorca Way, San Francisco,
California.

The deponent, being duly sworn according to law,
deposes and says that this statement is made on be-
half of the taxpayer named, and that the facts given
below are true and complete:

1. District in which return (if any) was filed:
San Francisco, California.
2. Period (if for income tax, make separate
form for each taxable year) from 19.., to
..... 19..
3. Character of assessment or tax: Estate tax.
4. Amount of assessment, \$15,076.91; dates of
payment: 6/13/45 (\$10,786.15) 11/27/45 (\$4290.76).
5. Date stamps were purchased from the Gov-
ernment
6. Amount to be refunded: \$15,076.91.
7. Amount to be abated (not applicable to in-
come or estate taxes) \$.....
8. The time within which this claim may be le-
gally filed expires, under Section.... of the Revenue
Act of 19...., on: Nov. 27, 1948.

The deponent verily believes this claim should
be allowed for the following reasons:

Plaintiff's Exhibit D—(Continued)

Revenue Act of 1942 and Regulations thereunder are unconstitutional as applied to Estate of Wm. S. Godfrey.

They forbid deduction of 50% of the community property in which taxpayer widow and sole distributee had vested $\frac{1}{2}$ interest. Measuring decedent's estate by her $\frac{1}{2}$ interest denies due process.

All of the insurance was community property in which widow had vested $\frac{1}{2}$ interest.

As to \$40,000 of the insurance: N. Y. Life Policy No. 8751507 for \$15,000 was issued May 9, 1924. On June 5, 1924 deceased insured and wife beneficiary made two several trust agreements with insurer, erecting trust in proceeds and thereafter insured had no control over policy.

N. Y. Life Policy No. 10,899,287 for \$25,000, was issued December 21, 1929. On Feb. 24, 1930, two several trust agreements made by deceased insured and wife beneficiary erecting trust in proceeds.

Thereafter insured had no interest in policy.

July 1937, decedent became permanently disabled and incurable incompetent. By all the policies further premiums were waived on the disability and no premiums were paid thereafter.

No part of said policies were includable in the gross estate taxed.

/s/ LOUISE K. GODFREY.

Sworn to and subscribed before me this 3rd day of December, 1945.

LOUIS WIENER,
Notary Public.

Plaintiff's Exhibit D—(Continued)

December 11, 1945

U. S. Collector of Internal Revenue
110 McAllister Street
San Francisco, California

Re: Estate of Godfrey, S. F. Superior 97680
Died November 6, 1944.

Dear Sir:

On December 3, 1945, I filed with you the claim of Mrs. Louise K. Godfrey, widow and sole distributee, on your Form 843.

According to my best information, the Supreme Court passed on the question of non-includability of half the community property yesterday. I have not yet had a chance to inspect the opinion, but I hasten to inform you that we still have the point of the non-includability of \$40,000.00 in insurance, as to which the insured and the beneficiary had erected a trust in the proceeds many years ago. We still feel that under the Treasury decision this \$40,000.00 of insurance should not have been included in the gross estate, for the purpose of Federal estate tax, for the reason that it had passed from the dominion of the insured.

Very respectfully yours,

.....

Attorney for Louise K. Godfrey, widow and sole distributee.

IMP:ml

Plaintiff's Exhibit D—(Continued)

Hon. F. M. Harless

U. S. Internal Revenue Agent In Charge

74 New Montgomery Street

San Francisco, California

RE: Estate of William S. Godfrey, Jr.

Your File NT-ET- First Calif.

Dear Sir:

Louise K. Godfrey formerly executrix and sole distributee of the above entitled estate, individually and as such Executrix, hereby makes protest of the proposed action of the Internal Revenue Agent in Charge, denying her application for a refund of \$15,076.91, on the ground that as to the two insurance policies of the New York Life Insurance Company, Nos. 8,751,507 and 10,899,287, the policies were governed by a Trust Agreement, made and entered into by the insured with the Insurance Company, and consented to and actually executed by this affiant, then the wife of the insured and now his widow, whereby the insured agreed to retain and keep up said policies of insurance, and that he would not revoke or alter the Trust Agreement, but would keep the same as as protection for Mrs. Godfrey and her children; that in accordance with said agreement said insured did not retain a right to surrender or revoke his nomination as beneficiary, or the said Trust Agreement. That all property in said policy retained by said insured was subject to said agreement between the insured and this claimant. Therefore, the said policies of insurance were not

Plaintiff's Exhibit D—(Continued)
includable in the gross estate of the insured, subject
to the Federal Estate Tax.

Dated: San Francisco, California, May 14, 1946.

LOUISE K. GODFREY,

Widow and Executrix and sole distributee of the
Estate of William S. Godfrey, Jr., Deceased.

Compliance with TD Form 1292.

Name and address of Taxpayer: Louise K. Godfrey, Executrix of Estate of William S. Godfrey, Jr. of 232 Mallora Way, San Francisco, California.

Date and symbol of letter advising of readjustment as to which protest is made; April 8, 1946. No symbol other than heading this letter.

Schedule of Findings as to which taxpayer excepts:

Estate Tax. Overassessment None. Correct tax liability \$15,076.91.

"Par. 2. Re: Proceeds of N. Y. Life Policies #8,751,507 and #10,899,287, totalling \$40,000—deceased retained all or sufficient incidents of ownership to include proceeds as part of taxable gross estate."

Grounds of exception: As to these two policies, there were trust agreements made years before the tax act applicable, founded on the agreement of the wife, principal beneficiary, which taken together negatived any real retention of the incidents of ownership, rendering the proceeds of the policies includable.

Year for which tax assessed: 1944.

Taxpayer desires a hearing.

Plaintiff's Exhibit D—(Continued)

Protest prepared by I. M. Peckham, 405 Montgomery Street, San Francisco, California, who does not know of his own knowledge the facts concerning the agreement between the insured and the beneficiary inconsistent with any real retention of the "incidents of ownership" relied on by the Agent in Charge.

Said attorney is admitted to practice before the Treasury Department. Power of Attorney accompanies this protest.

Said attorney has no agreement with taxpayer for any fixed fee for representing her in this matter.

/s/ LOUISE K. GODFREY.

Affidavit In Support Of Protest

State of California,

City and County of San Francisco—ss.

Louise K. Godfrey, being sworn deposes and says: That she is a citizen of the United States and a resident of the City and County of San Francisco. That she was the Executrix during its pendency of the estate of William S. Godfrey, Jr., deceased and sole distributee thereof, and was the wife of said William S. Godfrey, Jr., deceased, at the time that those certain Trust Agreements were made between William S. Godfrey, Jr., the insured and the New York Life Insurance Company, a life insurance company incorporated in the State of New York.

New York Life Policy No. 8,751,507, had theretofore been applied for and issued to William S. Godfrey, Jr., the said insured, and that the premiums

Plaintiff's Exhibit D—(Continued)

thereon were to be paid out of the community property of William S. Godfrey and affiant. The policy was issued April 24, 1924, and the Trust Agreement was made June 5, 1924.

The Policy No. 10,899,287 was issued February 24, 1930, and the Trust Agreement was made February 24, 1930.

In each case, at the time of the making of the Trust Agreements, Mr. Godfrey, the insured, requested affiant to sign a document releasing her community interest in the policies for the purpose of erecting the Trust, and affiant actually signed and became a party to the Trust Agreement.

At the time, Mr. Godfrey requested the plaintiff to sign the document releasing her community in the policies and consent to the trust arrangement, Mr. Godfrey promised and agreed with affiant that he would keep up the said policies for the protection of herself and the children and would pay all the premiums thereon and would retain and not surrender the policies, and that he would not make any change in the Trust arrangements, and it was in reliance on said promise that affiant consented to the making of the Trust Agreements. That Mr. Godfrey did retain the policies, kept up the Trust Agreement and never did make any attempt to alter the Trust Agreement or revoke it in any way during his lifetime.

That notwithstanding the Trust Agreements on their face provided that the agreement shall be void if the insured revokes the appointment, or makes

Plaintiff's Exhibit D—(Continued)

any change in beneficiary, or any of the payments on proceeds of the policy, or surrender the same for cash value, said provisions were inconsistent and at variance with the plain contract and agreement of Mr. Godfrey at the time this affiant signed the Trust Agreements.

Wherefore, affiant asserts that she had a vested interest in the Trust Agreements inconsistent with the provision for the annulment or agreement on a surrender, revocation or changing beneficiary. That it was a contract between the insured and this affiant that he would retain and keep up the policies and not attempt to revoke or change the Trust Agreement.

/s/ LOUISE K. GODFREY.

Subscribed and sworn to before me this 23rd day of May, 1946.

[Seal] LOUIS WIENER,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed April 9, 1948.

Mr. Peckham: Now the receipt for the remittance of November 27, 1947, for the deficiency of the estate tax of \$4,290.76—you have that?

Mr. Licking: No, I haven't.

Mr. Peckham: What?

Mr. Licking: You are going to furnish me copies of all these materials?

(The document last introduced in evidence was marked Plaintiff's Exhibit E.)

PLAINTIFF'S EXHIBIT E

Form 880—Revised July 1942
TREASURY DEPARTMENT
Internal Revenue Service

List: Nov. '45.

ORIGINAL

Notice and Demand for Estate Tax

Collector's Paid Stamp:

Rec'd with remittance 94 Nov. 27, 1945, Coll. Int.
Rev., 1st Dist., Cal.

To avoid further interest the amount on this no-
tice must be paid to Collector of Internal Revenue
at San Francisco, Calif.

Date November 26, 1945.

Name and Address:

Estate of William S. Godfrey, Jr.,
c/o Louise K. Godfrey, Executrix
232 Mallorca Way
San Francisco, Calif.

Old Balance or Remarks:

Died: Nov. 6, 1944
Deficiency Estate Tax
Waiver

Assessment:

\$4,290.76

Amount Paid:

\$4,290.76

Balance Due:

[Endorsed]: Filed April 9, 1948.

Mr. Peckham: The copies that you requested—Mr. Licking requested—he already has annexed to an affidavit.

Mr. Licking: They are attached to the affidavit?

Mr. Peckham: Yes.

Mr. Licking: Thank you.

Mr. Peckham: From the guardianship proceeding we offer in evidence the—San Francisco Superior Number 76422, we offer in evidence Order Appointing Guardian, Duplicate of letters of Guardianship, a copy of Petition for Leave to Borrow Money, the Order Permitting the Borrowing of Money, and the Appraisement in the Guardianship of William S. Godfrey, San Francisco Number 76422.

Mr. Licking: I have no objection. I have no doubt those are proper copies, but it seems to me they are immaterial.

Mr. Peckham: Counsel waiving certification?

Mr. Licking: I am waiving certification of the copies, but it seems to me they are immaterial.

The Court: What is the materiality?

Mr. Peckham: If the Court please, one of the things that the Government relied upon is that when this disability fell on Mr. Godfrey, Mr. Godfrey became incompetent, and she tried to restore him to competency and incurred claims and bills, the children were in college, she had to borrow money, and she borrowed the money the first way she could get it without pledging the stock in the corporation, and that was by borrowing on the

policies, and the Government has contended that by borrowing money as his guardian that constitutes an admission that the policies were not her policies, that the policies were policies of the estate.

Mr. Licking: For that purpose I withdraw my objection.

(The documents referred to were marked Plaintiff's Exhibit F.)

PLAINTIFF'S EXHIBIT F

In the Superior Court of the City and County of San Francisco, State of California

INVENTORY AND APPRAISEMENT

Probate Code 600-609

No. 76422 Probate

In the Matter of the Estate of

WILLIAM S. GODFREY, JR.,

An incompetent person.

Date of Adjudication of Incompetent: September 16, 1937.

OATH OF APPRAISER

State of California,

City and County of San Francisco—ss.

P. Paul Vlautin, Sr., appraiser of the estate of William S. Godfrey, Jr., an incompetent, being sworn, says: that he will truly, honestly, and impartially appraise the property of said estate, which shall be exhibited to him, according to the best of his knowledge and ability.

P. PAUL VLAUTIN.

Plaintiff's Exhibit F—(Continued)

Subscribed and sworn to before me, this 19th day of October, 1937.

[Seal] MARGARET IRWIN,
 Notary.

My Commission Expires February 24, 1938.

OATH OF GUARDIAN

State of California,

City and County of San Francisco—ss.

Louise K. Godfrey, Guardian of the Person and Estate of said incompetent, being sworn, says: That the annexed inventory contains a true statement of all the estate of the said incompetent, which has come to her knowledge and possession, and particularly of all money belonging to the incompetent, and of all just claims of the said incompetent against affiant.

/s/ LOUISE K. GODFREY.

Subscribed and sworn to before me, this 20th day of October, 1937.

[Seal] EMILY K. McCORRY,
Notary Public in and for the City and County of
San Francisco, State of California.

My Commission Expires January 16, 1939.

INVENTORY

Money belonging to said incompetent which has come to the hands of the Guardian—None.

Cash in the bank at Jones & Market Branch at the Anglo California National Bank—\$268.70.

Plaintiff's Exhibit F—(Continued)
Corporate Stocks

Certificate No. 14 for 167 shares of common stock of the Irving Theatre & Realty Co., a corporation—valued at—

Certificate No. 8 for 1 share of common stock of Irving Theatre & Realty Co., a corporation—Valued at \$15,000.00

Certificate No. 33 for 99 shares of common stock of North Beach Theatres Inc., a corporation—valued at—

Certificate No. 24 for 1 share of common stock of North Beach Theatres Inc., a corporation—Valued at 5,000.00

Certificate No. 14 for 500 shares of Fairmont Theatre Co., a corporation—valued at—

Certificate No. 9 for 1000 shares of common stock of Fairmont Theatre Co., a corporation—valued at— .

Certificate No. 1 for 1 share of common stock of Fairmont Theatre Co., a corporation—Valued at 5,000.00

Certificate No. C-251032 for 100 shares of common stock of Standard Brands Inc., a corporation—Valued at 975.00

Certificate No. WO-47118 for 8 shares Radio Corporation of America, a corporation—Valued at 66.00

Plaintiff's Exhibit F—(Continued)

Fractional receipt No. 214485 for fractional interest of 26 shares of common stock of Radio Corporation of America, option date expired—Valued at	nil
Certificate No. N.F. 68664 for 20 shares of common stock of P. G. & E. Co., a corporation—Valued at	505.00
Certificate No. F-108865 for 2 shares of common stock of P. G. & E. Co., a corporation—Valued at	50.50
1 promissory note for \$13,000.00 from the Fairmont Theatre Co., a corporation, to the order of William S. Godfrey, Jr., dated July 16, 1937—Valued at	13,000.00
Total	\$39,865.20

So far as can be ascertained by said Guardian the estate mentioned in the foregoing inventory is community property.

I, the undersigned appraiser of the estate of William S. Godfrey, Jr., an incompetent, hereby certify that the property in the foregoing inventory described has been exhibited to and examined by me, and that I appraise each item thereof as of the time of the adjudication of incompetent, at the figures set opposite that item, and the whole of said property at the sum of Thirty Nine Thousand Eight

Plaintiff's Exhibit F—(Continued)
Hundred and Sixty-Five and 20/100 dollars (\$39,-
865.20).

Dated: October 19th, 1937.

P. PAUL VLAUTIN, SR.,
Appraiser.

Verified Account of Appraisers
Estate of Willam S. Godfrey, Jr., Incompetent,
To P. Paul Vlautin, appraiser. Dr.

To compensation for services in appraising said
estate—items as follows: . . . days services at \$. . .
per day each:—\$39.86.

Necessary disbursements—as follows: Notary fees
—\$1.50: Total—\$41.36.

State of California,
County of San Francisco—ss.

P. Paul Vlautin, Sr., the appraiser above named,
being duly sworn, say: that the foregoing bill of
items is correct and just, and that the services have
been duly rendered as therein set forth.

P. PAUL VLAUTIN, SR.

Subscribed and sworn to before me, this 19th day
of October, 1937.

[Seal] MARGARET IRWIN.
My Commission Expires February 24, 1938.

I. M. PECKHAM,
GEORGE E. HARRIS,
Attorneys for Guardian.

Plaintiff's Exhibit F—(Continued)

In the Superior Court of the State of California,
in and for the City and County of San Francisco
No. 76422 Dept. No. 9 Probate

In the Matter of the Estate and Guardianship of
WILLIAM S. GODFREY, JR.,
an incompetent person.

**ORDER AUTHORIZING BORROWING
OF MONEY**

On reading and filing the verified petition of Louise K. Godfrey, guardian of the person and estate of said ward, and good cause appearing therefor, it is hereby ordered, adjudged and decreed that Louise K. Godfrey, guardian of the person and estate of William S. Godfrey, Jr., the above named ward, be and she hereby is authorized and directed to borrow from the New York Life Insurance Company, a life insurance corporation, incorporated in the State of New York, the sum of \$6534.00 upon the following policies upon the life of said ward, in the following amounts:

policy number 10,899,289	\$1159.00
policy number 10,899,287	\$2875.00
policy number 8,751,507	\$2500.00
a total of	\$6534.00

Done in Open Court at San Francisco, this 18th day of September, 1937.

.....,

Judge of said Superior Court.

Plaintiff's Exhibit F—(Continued)

In the Superior Court of the State of California,
in and for the City and County of San Francisco

No. 76422 Dept. No. 9 Probate

In the Matter of the Estate and Guardianship of

WILLIAM S. GODFREY, JR.,

an incompetent person.

PETITION FOR LEAVE TO BORROW MONEY

To the above entitled Superior Court, the Petition of Louise K. Godfrey, guardian of the above named incompetent respectfully shows:

I.

That on September 16, 1937, the above entitled Court duly gave, and made its order appointing petitioner as guardian of the above named ward; that petitioner immediately qualified as such and is now the duly appointed, qualified and acting guardian of the person and estate of said ward.

II.

That said ward was under treatment privately for more than three months at the time his disability came upon him, and bills were incurred, the exact extent of which has not yet been determined. At said time, arrangements had also been made to matriculate the son and daughter of said ward in Menlo Junior College and Mills College respectively, and notwithstanding said disability it seemed wise to petitioner to carry out the plans of said ward

Plaintiff's Exhibit F—(Continued)

and have said son and daughter matriculate as planned; that the expenses of said matriculation will be \$1350.00 and \$1300.00 respectively.

III.

That there is only a small amount of cash, \$100.00 or thereabouts, that has come into the hands of petitioner as guardian of said ward, but said ward had three separate policies of life insurance with the New York Life Insurance Company, a life insurance company incorporated in the State of New York, one numbered 10,899,289, for \$10,000.00; one numbered 10,899,287, for \$25,000.00, and one numbered 8,751,507, for \$15,000.00; that the loan value of said policies is in excess of \$8400.00; that it is for the best interest of the estate of said ward to borrow from said life insurance company, the following sums on each of said policies:

policy 10,899,289,	the sum of \$1159.00;
policy 10,899,287,	the sum of \$2875.00;
policy 8,751,507,	the sum of \$2500.00;
a total of	\$6534.00;

that in the opinion of petitioner, it is necessary, expedient and for the best interest of the estate of said ward to borrow said sums.

Wherefore, petitioner prays the order of the above entitled Court authorizing said petitioner as

Plaintiff's Exhibit F—(Continued)

guardian of said ward to borrow the sum of \$6534.00 from said life insurance company on said polices.

LOUISE K. GODFREY,

Guardian of said ward,

By I. M. PECKHAM and

GEORGE HARRIS,

Attorneys for said Guardian.

State of California,

City and County of San Francisco—ss.

Louise K. Godfrey, being first duly sworn, deposes and says:

That she is the petitioner in the foregoing Petition, and the guardian of the above named incompetent; that she has read the foregoing Petition and knows the contents thereof; that the same is true of her own knowledge, except as to those matters that are therein stated upon her information and belief, and as to those matters, she believes it to be true.

.....
Subscribed and sworn to before me this.....day
of September, 1937.

.....,
Notary Public in and for the City and County of
San Francisco, State of California.

County Clerk Probate Dept. Form No. 15

Duplicate Filed September 16, 1937.

H. A. VAN DER ZEE,

Clerk,

By /s/ S. I. HUGHES,
Deputy Clerk.

Plaintiff's Exhibit F—(Continued)

In the Superior Court of the State of California,
in and for the City and County of San Francisco

LETTERS OF GUARDIANSHIP

Department No. 9 Probate
No. 76422

State of California,
City and County of San Francisco—ss.

Louise K. Godfrey is hereby appointed Guardian of the Person and Estate of William S. Godfrey, Jr., an incompetent person.

Witness, H. A. van der Zee, Clerk of the Superior Court of the State of California in and for the City and County of San Francisco, with the Seal of said Court affixed this 16th day of September, A.D. 1937.

By order of the Court,

H. A. VAN DER ZEE,
Clerk,

[Seal] By /s/ S. I. HUGHES,
Deputy Clerk.

State of California,
City and County of San Francisco—ss.

I do solemnly swear that I will support the Constitution of the United States, and the Constitution of the State of California; and that I will faithfully discharge the duties of Guardian of the Person and

Plaintiff's Exhibit F—(Continued)

Estate of William S. Godfrey, Jr., an incompetent person, according to law.

/s/ LOUISE K. GODFREY.

Subscribed and sworn to before me this 16th day of September, 1937.

/s/ S. I. HUGHES,

Deputy County Clerk.

In the Superior Court of the State of California,
in and for the City and County of San Francisco

Department No. 9 Probate

No. 76422

ORDER APPOINTING GUARDIAN

In the Matter of the Estate and Guardianship of
WILLIAM S. GODFREY, JR.,

an incompetent person.

The petition of Louise K. Godfrey praying to be appointed the Guardian of the person and estate of said William S. Godfrey, Jr., an incompetent person, coming on regularly to be heard, upon due proof to the satisfaction of said Court that notice has been given to the relatives of the said William S. Godfrey, Jr., an incompetent person, residing in this City and County, and to the person under whose care said William S. Godfrey, Jr., now is as required by law and as directed by this Court; and it duly appearing to the Court that said William S. Godfrey, Jr., is a resident of the said City and

Plaintiff's Exhibit F—(Continued)

County, and that he has estate within the State of California, which need the care and attention of some fit and proper person, which estate is of the value of \$.....

It Is Hereby Ordered, That said Louise K. Godfrey be and she is hereby appointed Guardian of the person and estate of said William S. Godfrey, Jr., an incompetent person, and that letters of Guardianship of the person and estate of said William S. Godfrey, Jr., an incompetent person, be issued to Louise K. Godfrey upon her giving bond to said William S. Godfrey, Jr. said incompetent, in the sum of Five Thousand Dollars.

Dated this 16th day of September, 1937.

/s/ F. H. DUNNE,

Judge of the Superior Court.

Filed October 20, 1937.

H. A. VAN DER ZEE,
Clerk.

[Endorsed]: Filed April 9, 1948.

Mr. Peckham: Now, from the probate estate number 97680 we offer in evidence the last will and testament—you have a copy that you prefer to have me use instead of mine?

Mr. Licking: The copy I have is one of these unfortunate small photostatic reproductions.

Mr. Peckham: The only significance of it is the

provision leaving his estate to Mrs. Godfrey. We will substitute that for this, if you don't mind.

Mr. Licking: What do you mean?

Mr. Peckham: For this one (exhibiting). My copy, you object to that because it is marked.

Mr. Licking: There are some pencil marks on this, if the Court please. They would not mislead the Court, if your Honor please, and they can be erased. It is easier to read that than this.

Mr. Peckham: We offer, then, from the probate records the copy of the will of March 4, 1930, the order admitting it to probate, the letters testamentary, and the decree of settlement of first and final account and of distribution, as one exhibit next in order.

Mr. Licking: I have no objection to the correctness of the copies; however, I can't see the materiality of it to the question here, and I object on that ground.

The Court: Overruled.

(The documents referred to were marked Plaintiff's Exhibit G.)

PLAINTIFF'S EXHIBIT G

In the Superior Court of the State of California,
in and for the City and County of San Francisco

No. 97680

In the Matter of the Estate

of

WILLIAM S. GODFREY, JR.,

Deceased.

DECREE OF SETTLEMENT OF FIRST AND
FINAL ACCOUNT AND OF DISTRIBUTION

Comes now Louise K. Godfrey, the executrix of the last will and testament of William S. Godfrey, Jr., said decedent, by I. M. Peckham, her attorney, and presents to the court for settlement and allowance, her first and final account showing charges in favor of said estate amounting to \$104,300.31, and claiming credits amounting to \$19,537.95 and leaving a balance of \$84,762.36 in her hands belonging to the said estate and she now proves to the satisfaction of the court that the said account was filed on July 16, 1945; that on the same day the Clerk appointed the 30th day of July, 1945, as the day for the settlement thereof and that due notice of the time and place of the said settlement and hearing has been duly given as required by law and no person appearing to except to or contest said account the court, after hearing the evidence, finds said account correct.

Wherefore, It Is Ordered, Adjudged and Decreed

by the court that said account be and it hereby is in all respects approved, allowed and settled as presented and that the attorney's fees of said executrix for the ordinary and extraordinary services of said attorney be fixed, settled and allowed at the sum of \$1800.00

And it appearing that on the same day the executrix filed her petition for distribution and that the same was set for hearing at the same time and that due and legal notice of the time and place of hearing has been given as required by law and the court, after hearing the evidence, orders distribution of said estate as follows:

It is ordered, adjudged and decreed by the court that said deceased left surviving as his only heirs at law, those certain persons whose names and relationship to said decedent are as follows:

Louise K. Godfrey, widow, residing at 232 Mallorca Way, San Francisco, California;

Norma A. Godfrey, daughter, residing at 232 Mallorca Way, San Francisco, California;

William S. Godfrey III, residing at 206 Fairmont Street, San Francisco, California.

Said decedent died testate and all of his estate was distributed by his will as hereinafter decreed and all the residue of said estate and all other property of said estate either described herein or not, whether known or unknown and wheresoever situated be distributed according to law and the provisions of said will as follows:

To Louise K. Godfrey all of the residue of said estate.

Said residue so distributed to Louise K. Godfrey, consists, insofar as is now known, of the following items:

Cash in the Jones-Market Branch of the Anglo California Trust Company.

U. S. War Bonds of the face value of.

1 Pontiac 1937 business coupe automobile.

1 Olds 1940 Sedan automobile.

Household furniture at residence at 232 Mallorca Way, San Francisco, California.

The following certificates of corporate stock:

Cert. #14 for 167 shares and cert. #8 for 1 share of common stock of Irving Theatre and Realty Co., a corporation incorporated in the State of California.

Cert. #14 for 500 shares, cert. #9 for 1000 shares and cert. #1 for 1 share of common stock of Fairmont Theatre Company, a corporation incorporated in the State of California.

Cert. #33 for 99 shares and cert. #24 for 1 share of common stock of North Beach Theatres, Inc., a corporation incorporated in the State of California.

Cert. #NT 65704 for 25 shares of common stock of Standard Brands, Inc., a corporation.

Cert. #WO-47118 for 8 shares of common stock of Radio Corporation of America, a corporation.

Cert. #NF 68664 for 20 shares, and cert. #F-108865 for 2 shares of common stock of Pacific Gas

and Electric Co., a corporation incorporated in the State of California.

Done in Open Court this 30th day of July, 1945.

T. I. FITZPATRICK,

Judge of Said Superior Court.

[Endorsed]: Filed July 30, 1945, H. A. van der Zee, Clerk, by Luther Dobson, Deputy Clerk.

In the Superior Court of the State of California in
and for the City and County of San Francisco
Department No. 9 Probate

Letters Testamentary

No. 97680

State of California,

City and County of San Francisco—ss.

The last Will of William S. Godfrey, sometimes called William S. Godfrey, Jr., sometimes called William Sherman Godfrey, sometimes called William Sherman Godfrey, Jr., deceased, having been proved and recorded in the Superior Court of the State of California, in and for the City and County of San Francisco, Louise K. Godfrey who is named therein as such, is hereby appointed Executrix thereof.

Witness, H. A. van der Zee, Clerk of the Superior Court of the State of California in and for the City and County of San Francisco, with the Seal of said Court affixed.

Dated December 1st, 1944.

By order of the Court,

H. A. VAN DER ZEE,

Clerk.

[Seal] By /s/ [Illegible.]

Deputy Clerk.

State of California,

City and County of San Francisco—ss.

I do solemnly swear that I will support the Constitution of the United States, and the Constitution of the State of California; and that I will faithfully discharge the duties of Executrix of the Last Will and Testament of the above-named deceased, according to law.

/s/ LOUISE K. GODFREY.

Subscribed and sworn to before me Dec. 1, 1944.

/s/ [Illegible.]

Deputy County Clerk.

In the Superior Court of the State of California
in and for the City and County of San Fran-
cisco

No. 97680—Dept. No. 9

In the Matter of the Estate
of

WILLIAM S. GODFREY, Sometimes Called Wil-
liam S. Godfrey, Jr., Sometimes Called Wil-
liam Sherman Godfrey, Sometimes Called Wil-
liam Sherman Godfrey, Jr.,

Deceased.

**ORDER ADMITTING WILL TO PROBATE
AND FOR LETTERS TESTAMENTARY
AND FOR FAMILY ALLOWANCE PEND-
ING RETURN OF INVENTORY**

Now comes the petitioner, Louise K. Godfrey, by I. M. Peckham, her attorney, and proves to the satisfaction of the court that the time for hearing the petition for probate of the will herein filed on the 16th day of November, 1944, and for letters testamentary thereon, was by the Clerk duly set for December 1, 1944, and that notice of said hearing has been duly given in the manner and for the time required by law; and no person appearing to contest the said petition, the court proceeded to hear the evidence and thereupon finds that all the facts alleged in said petition are true and that said petition ought to be granted.

It Is Therefore Ordered, Adjudged and Decreed

by the court that William S. Godfrey, also called William S. Godfrey, Jr., also called William Sherman Godfrey, also called William Sherman Godfrey, Jr., died on November 6, 1944, a resident of the City and County of San Francisco, State of California, leaving estate in said city and county, and that the document heretofore filed, purporting to be his last will, and so alleged to be in said petition, be admitted to probate as the last will of said deceased; that Louise K. Godfrey be appointed executrix of the said last will and testament, and that letters testamentary issue to said Louise K. Godfrey without any bond, upon her taking the oath required by law.

It Is Further Ordered that the said executrix be and she hereby is authorized and directed to pay to Louise K. Godfrey, widow of said deceased, for her support and maintenance the sum of \$500.00 per month, the same to date from the date of the death of said decedent, to wit: November 6, 1944, and to continue on the corresponding day of each and every month thereafter during the administration of said estate, or until otherwise ordered by this court.

Done in Open Court this 1 day of December, 1944.

/s/ T. I. FITZPATRICK,
Judge of the Superior Court.

Last Will and Testament

I, William S. Godfrey, sometimes known as William S. Godfrey, Jr., being of sound mind and dis-

posing memory and not acting under the advice, fraud, influence or duress of any person or persons, but acting solely upon my own free will, do hereby make and declare this to be my Last Will and Testament, and give and bequeath my property of whatever I may die possessed of, in the following manner, that is to say:

First:—I desire to be buried according to my station in life and direct my Executrix, herein-after appointed, to pay the expenses of my funeral and those of my last illness, as soon as there is sufficient moneys in my estate to liquidate the same.

Second:—I give and bequeath my property, whatever I may die possessed of, real, personal or mixed, to my beloved wife, Louise Godfrey, without any qualifications, limitations or conditions.

Third:—I expressly make no provision for my children, William S. Godfrey and Norma Godfrey, minors, as I am satisfied in my mind that my beloved wife will take care of them and each of them to the best of her ability and give them such support, maintenance and education as I would have done if living.

Fourth:—I hereby designate and appoint my said wife, Louise Godfrey, sole Executrix of this My Last Will and Testament, and expressly request that no bonds or undertaking be required of her prior to qualifying as such, and I further authorize and empower her, the said Louise Godfrey, as such Executrix, to sell the whole or any portion of my estate

at public or private sale, as she may deem best and beneficial, without the necessity of obtaining therefor an order of Court prior to the making of said sale, and without being required to give any bond or undertaking prior to such sale.

In Witness Whereof, I have hereunto set my hand and seal this 4th day of March, 1930.

[Seal] WILLIAM S. GODFREY.

We, the undersigned, do hereby certify that on the date last written, William S. Godfrey, sometimes known as William S. Godfrey, Jr., executed the above instrument in our presence and in the presence of each other, and then and there declared to us and each of us, in the presence of each other, that the same was his Last Will and Testament; and we thereupon, at his request and in his presence and in the presence of each other, signed our names as witnesses thereto.

HARRY SACK,

Residing at Whitcomb Hotel,
San Francisco.

A. NEWBURGH,

Residing at 2257 Vallejo St.,
San Francisco, Cal.

[Endorsed]: Filed April 9, 1948.

Mr. Peckham: The order for discharge is not there, your Honor, but actually it was made September 17 of 1945, and I think counsel will probably stipulate to that.

Mr. Licking: I have no question—you can substitute a copy when you get it, I have no question that that is a fact, but it seems to me it is incompetent and immaterial to any issue here, and I object on that ground.

The Court: I don't see the materiality of the discharge.

Mr. Peckham: It is just this, your Honor: It is necessary to find the claim for this refund completely in the distributee, Mrs. Godfrey, that she be discharged in the probate proceeding.

The Court: If there was a distribution, wouldn't that find it?

Mr. Peckham: Pardon me?

The Court: If there was a distribution, wouldn't that find it?

Mr. Peckham: I would say so, but not under the view of the Treasury, your Honor.

The Court: Sustained.

Mr. Peckham: Now, the seventeenth allegation we allege that by reason of the wrongful inclusion of these two policies there was an overcharge of estate taxes of \$10,088.90. My tax accountant has died several months back, and I understand it is the practice, if counsel consents to it, if the Court finds that these policies were wrongfully included, that the matter be referred to the Internal Revenue to refigure the tax with the policies out. We have had difficulties with adjustments and they have all to be referred afterwards to provide for that, because the controller and the treasury won't

pay the judgment where the interest is not figured according to their policies.

In other words, your Honor, we will consent to the substitution of the Treasury Department for this Court.

The Court: Substitute the executive branch for the judicial.

Mr. Peckham: Is that agreeable? [13*]

Mr. Licking: I feel that is proper. If there is anything due, the sum that is due will be because of improper inclusion of these two policies in the trust fund.

Mr. Peckham: Mrs. Godfrey, will you come forward—oh, Mr. Rattenbury, one of the witnesses in this case, is the agent who wrote these policies, your Honor, and I prepared an affidavit for Mr. Rattenbury after examining him very carefully in the office of Mr. Cody, and submitted a copy to counsel to stipulate that if he were called he would testify that way, and counsel told me that he could not see his way to so stipulate, so I subpoenaed Mr. Rattenbury, who was down here and reported to my office yesterday, and the situation in his household is this, that his wife has been operated on for a tumor, proved to be malignant, and the succession of operations has affected her mentally and he is afraid to leave her any more, he can't leave her any more. He lives up in Dixon. He is the same W. A. Rattenbury who was in charge of the Sacramento office of the New York Life at one time. He

* Page numbering appearing at top of page of original Reporter's Transcript.

still keeps an office in Sacramento. So under the circumstances he cannot be here, and he has made an affidavit and requests the Court to excuse him from testifying here, and accept in lieu thereof the testimony he has given in the affidavit which was formerly prepared.

Mr. Licking: Well, I haven't any doubt that Mr. Rattenbury, if called and if permitted by the Court to answer the interrogatories which elicited the statements made in this affidavit would make those statements, but the materiality of the statements and the propriety of the statements is objectionable—most of the statements made by Mr. Rattenbury in this affidavit are immaterial, a great many of them are clearly hearsay, and from the first testimony introduced in what he considered a clear violation of the trust covenant, they are objectionable entirely on that ground. The covenant of the trust provides that the beneficiaries may be changed. That is the trust that is in evidence.

If your Honor will look through the affidavit, it is short—

Mr. Peckham: The affidavit I propose to file with the affidavit he made yesterday explaining why he is not here this morning—

Mr. Licking: Well, the affidavit explaining why he is not here, there is no objection.

Mr. Peckham: Your Honor doesn't want that read, do you?

The Court: No.

Mr. Peckham: We will offer that in evidence.

(The document referred to was marked Plaintiff's Exhibit H.)

Mr. Licking: I don't think there is any question but what that is true.

Mr. Peckham: Now, the affidavit of Rattenbury itself is [15] this, and I suggest that we examine and go over the contents of it.

Mr. Rattenbury, sworn—title of court and cause, affidavit of witness and stipulation.

"W. A. Rattenbury, being first duly sworn, says:

"I am a citizen of the United States and of the State of California over the age of twenty-one years and not a party to the above-entitled action," and so forth and so on.

Mr. Licking: I have no objection to the first paragraph.

Mr. Peckham: The first paragraph you have no objection to.

The second paragraph:

"I knew William S. Godfrey, Jr., the insured in said policies in his lifetime, and at the time of the issuance of said policies and trust agreements, and had known him all his life, I also knew his wife, now his widow, Louise K. (for Krause) Godfrey, plaintiff in the above-entitled action"—.

Mr. Licking: I have no objection to the second paragraph. I don't see that it proves anything, but it is not prejudicial to anything.

Mr. Peckham: All right, no objection to that.

"Prior to April 24, 1924, at San Francisco, California, I sold to said William S. Godfrey a pol-

icy of [16] life insurance with said company on his life in the sum of \$15,000"—

Mr. Licking: It seems to me that is just encumbering the record. The policies are already in evidence.

Mr. Peckham: If the Court will bear with me, you had denials on information and belief, you see; this is trying to overcome. That paragraph you have no objection to. The fourth paragraph—

Mr. Licking: That is beginning on twenty?

Mr. Peckham: Line 20.

Mr. Licking: It seems to me clear as to that whole paragraph without your reading it, the Court just glancing at it, that the trust agreements are in evidence and that all that Mr. Rattenbury says was provided is invading the province of the Court and immaterial.

Mr. Peckham: Yes. Submit it, your Honor.

The Court: Sustained.

Mr. Peckham: "The trust agreements were prepared by me and were sent to the home office of said company for the company's execution and return.

"I informed Mr. Godfrey, the insured, that it would be necessary for his wife to sign her consent to the trusts on both originals and both duplicates.

"When we went to go home on Masonic Avenue, San Francisco, she did so sign her consent to the trust [17] agreements. At that time she said, in substance, that it was a splendid thing for Will

(the insured) to make this provision for his family, and to agree to keep up this policy intact for the protection of her and the children."

Mr. Licking: It seems to me that is hearsay and irrelevant, "at that time she said in substance."

Mr. Peckham: It is part of the act of finding.

The Court: Overruled.

Mr. Peckham: "I was not present at any agreements between Mr. Godfrey, the insured, or his wife, regarding the policy or the trust agreements, but Mr. Godfrey, the insured, always stated that it was his determination to keep up the policies intact for the protection of Mrs. Godfrey and the children. He so stated at the time I prepared and he signed said trust agreements."

Mr. Licking: That, it seems to me, is entirely hearsay.

Mr. Peckham: If the Court please, that is where counsel and I differ. This is a declaration of a declarant as to his state of mind. The only person who can tell us that is the declarant himself.

The Court: Overruled.

Mr. Peckham: "He said nothing about surrender or assigning of policy, or changing beneficiary, or revoking the appointment of trustee, but such action was entirely inconsistent with his expressed intentions at the time." [18]

Mr. Licking: That, of course, is argumentative.

The Court: It is a conclusion.

Mr. Licking: It should go out.

Mr. Peckham: That is out.

"I was also the agent who negotiated the sale to Mr. Godfrey of New York Life Policy Number 10,899,207. I sold that policy to him shortly prior to December 29, 1930, and on said date said company made executed and delivered, and I delivered personally said policy of insurance on his life for \$25,000 to Mr. Godfrey.

"Again I wrote the policy.

"In general, the same thing took place as to this policy, and again Mr. Godfrey ordered similar trust agreements in its proceeds.

"I prepared the trust agreements on or about February 24, 1930, and procured the signature of Mrs. Godfrey to the consent.

"Again, I was not present at any conversation between Mr. Godfrey and Mrs. Godfrey, as to any agreement between them as to the policy, but again Mr. Godfrey stated his determination to keep and keep up the policy intact for the protection of Mrs. Godfrey and the children."

Mr. Licking: Now, as to that latter sentence, beginning with "but," I have the same objection as heretofore, and I would like to have the Court reconsider the former ruling in [19] view of the sentence, now that the whole thing is together here, that he was never present at any time when there was any agreement between Mr. and Mrs. Godfrey.

The Court: Same ruling.

Mr. Peckham: "Again nothing was said by Mr. Godfrey about any assignment or surrender of the policy or changes of beneficiary therein."

Mr. Licking: That should certainly go out.

The Court: Yes.

Mr. Peckham: "But such course was totally contrary to his expressed intention and concern."

I defer to his Honor's former ruling.

The Court: Same ruling.

Mr. Peckham: "This was particularly true as to the 1929 policy."

Mr. Licking: That also should go out.

The Court: Yes.

Mr. Peckham: "The great depression of that year had broken, attendance at his theaters had fallen off, Mr. Godfrey's business was unstable, Bill, Mr. Godfrey's son, was sickly, Mrs. Godfrey was in bad health, had to go to Arizona, Mr. Godfrey expressed great concern of the future of his business and the safety and security of his family and the education of his children in case anything happened to him. I can say absolutely, from [20] all his expressions to me at the time, that nothing was further from his mind than surrender or pledging his policies, changing his beneficiaries or revoking the appointments in the trust agreements."

Mr. Licking: I object to the whole of that paragraph just read on the ground it is an expression of hearsay.

The Court: Beginning with—

Mr. Peckham: Beginning with "the great depression"?

The Court: "This is particularly true of the

1929 policy." From there on the objection is sustained.

Mr. Peckham: In other words, all the circumstances on the depression and everything on that, your Honor is striking out?

The Court: Yes.

Mr. Peckham: And that the child was sick and Mrs. Godfrey—

The Court: I don't see that has anything to do with it.

Mr. Peckham: I think, your Honor, we are entitled to show the background under which these agreements were made to show the probability that he entered into such a contract. It is corroborative.

Mr. Licking: Corroborative of what?

Mr. Peckham: Of what Mrs. Godfrey will testify to in a few moments.

The Court: Well, there might be some materiality in the [21] fact that she was in poor health and the boy was sickly. The rest of it is purely conclusion, "I can say absolutely from all his expressions."

Mr. Peckham: What he said was a conclusion—

The Court: "I can say absolutely from all his expressions to me at the time that nothing was further from his mind" is absolutely a conclusion.

Mr. Peckham: I concede that.

The Court: That Mrs. Godfrey was in bad

health, I will permit that to stay in, but as to the rest of it the objection is sustained.

Mr. Peckham: "It was then his stated determination to keep the policies and keep them up intact for the protection of his wife and children."

Mr. Licking: Same objection.

The Court: Same ruling I made before.

Mr. Peckham: Out?

The Court: No, in.

Mr. Peckham: "At that time Mr. Godfrey said he was not going to change his beneficiaries or surrender or borrow on the policy, and Mrs. Godfrey said in Mr. Godfrey's presence that it was a wonderful thing for Bill to provide for her and the children in that way."

Mr. Licking: Same objection,—

The Court: Overruled. [22]

Mr. Licking: —I made before, it is immaterial.

The Court: Overruled.

Mr. Peckham: "There was some talk at the time of Mrs. Godfrey taking out a similar policy on her life for the protection of Mr. Godfrey and the children, but it never eventuated in a policy, and the state of her health and that of the boy was not such as to justify issuing a policy on her or the children."

Mr. Licking: What is the materiality of that? I object on the ground it is incompetent and immaterial, it has nothing to do with any possible issue in the case.

The Court: Sustained.

Mr. Peckham: "I have read the foregoing affidavit. I have also inspected my records and the records of the New York Life Insurance Company on the matter, and this affidavit states my best recollection at this time of the events it mentions. W. A. Rattenbury. Subscribed and sworn to before me"—the jurat.

I have offered the affidavit.

Mr. Licking: I suppose the stipulation, then, should be signed admitting the affidavit or just admit the affidavit on the present offer as changed by the Court's ruling.

Mr. Peckham: All the stipulations are subject to the Court's determination, and we will submit the affidavits subject to the Court's determination. [23]

(The affidavit referred to was marked Plaintiff's Exhibit I.)

PLAINTIFF'S EXHIBIT I

District Court of the United States, Northern
District of California, Southern Division

Civil Action No. 27659-G

LOUISE K. GODFREY,

Plaintiff,

vs.

JAMES G. SMITH, Collector

etc.,

Defendant.

AFFIDAVIT OF WITNESS AND
STIPULATION

United States of America,
Northern District of California,
County of Solano—ss.

W. A. Rattenbury, being first duly sworn, says:

I am a citizen of the United States and of the State of California over the age of twenty-one (21) years and not a party to the above entitled action; that I reside and ever since prior to April 1, 1924, have resided continuously in Dixon, County of Solano in said state; that on April 1, 1924, I was, and ever since said date have been an agent for the sale of insurance of the New York Life Insurance Company, at all times herein mentioned a life insurance company incorporated in the State of New York; that at the dates of the issuance of the policies and trust agreements hereinafter mentioned I

had an office for taking care of my business for said company in the City of Sacramento, State of California.

I knew William S. Godfrey Jr., the insured in said policies in his lifetime, and at the time of the issuance of said policies and trust agreements, and had known him all his life, I also knew his wife, now his widow, Louise K. (for Krause) Godfrey, plaintiff in the above entitled action, at all said times. They had lived in Vacaville, California, for a long time, but at the times of the issuance of said policies and the making of said trust agreements they were living in San Francisco and down on the peninsula in San Mateo County, California.

Prior to April 24, 1924, at San Francisco, California, I sold to said William S. Godfrey, a policy of life insurance of said company on his life in the sum of \$15,000.00, and thereafter said company made, issued and delivered, and I delivered personally to said insured New York Life Policy Number 8751507, and said insured paid the premium therefor.

Thereafter said insured arranged to have two separate trusts erected in the proceeds of said policy, each covering one-half the proceeds of said policy, by the terms of which said company would pay an income from such half to said Louise Krause Godfrey for life, and after her death the balance of such proceeds to Norma Louise Godfrey, daughter of said insured, as to one half, and to William S. Godfrey, Jr., son of said insured, as to the other

half. I prepared said trust agreements at the insured's office in the Haight Theater in San Francisco, and then we went to his home, then on Masonic Ave., San Francisco to get his wife's signed consent thereto; the Superintendent of the Home Office of said company, had theretofore written the Sacramento Branch office of said company, that it would be necessary for the wife of the insured to sign her consent to the trusts on both originals and both duplicates.

The trust agreements were prepared by me and were sent to the Home office of said company for the Company's execution and return.

I informed Mr. Godfrey the insured that it would be necessary for his wife to sign her consent to the trusts on both originals and both duplicates.

When we went to the home on Masonic Avenue, San Francisco, she did so sign her consent to the trust agreements. At that time she said, in substance, that it was a splendid thing for Will (the insured) to make this provision for his family, and to agree to keep up this policy intact for the protection of her and the children.

I was not present at any agreements between Mr. Godfrey, the insured, or his wife, regarding the policy or the trust agreements, but Mr. Godfrey, the insured, always stated that it was his determination to keep up the policies intact for the protection of Mrs. Godfrey and the children. He so stated at the time I prepared and he signed, said trust agreements. He said nothing about surrender or

assigning of policy, or changing beneficiary, or revoking the appointment of trustee, but such action was entirely inconsistent with his expressed intentions at the time.

I was also the agent who negotiated the sale to Mr. Godfrey of New York Life Policy No. 10 899 287. I sold that polciy to him shortly prior to December 29, 1930, and on said date said company made executed and delivered, and I delivered personally said policy of Insurance on his life for \$25,000.00 to Mr. Godfrey.

Again I wrote the policy.

In general, the same thing took place as to this policy, and again Mr. Godfrey ordered similar trust agreements in its proceeds.

I prepared the trust agreements on or about February 24, 1930, and procured the signature of Mrs. Godfrey to the consent.

Again, I was not present at any conversation between Mr. Godfrey and Mrs. Godfrey, as to any agreement between them as to the policy, but again Mr. Godfrey stated his determination to keep and keep up the policy intact for the protection of Mrs. Godfrey and the children. Again nothing was said by Mr. Godfrey about any assignment or surrender of the policy or changes of beneficiary therein, but such course was totally contrary to his expressed intention and concern. This was particulary true as to the 1929 policy. The great depression of that year had broken, attendance at his theaters had fallen off, Mr. Godfrey's business was unstable.

Bill, Mr. Godfrey's son was sickly, Mrs. Godfrey was in bad health, had to go to Arizona, and Mr. Godfrey expressed great concern at the future of his business, and the safely and security of his family and the educatoin of his children in case anything happened to him. I can say absolutely, from all his expressions to me at the time that nothing was further from his mind than surrender or pledging his policys changing his beneficiaries or revoking the appointments in the trust agreements.

It was then, his stated determination to keep the policies, and keep them up intact for the protection of his wife and children.

At that time, Mr. Godfrey said he was not going to change his benficiaries, or surrender or borrow on the policy, and Mrs. Godfrey said in Mr. Godfrey's presence that it was a wonderful thing for Bill to provide for her and the children in that way.

There was some talk at the time of Mrs. Godfrey taking out a similar policy on her life for the protection of Mr. Godfrey and the children, but it never eventuated in a policy, and the state of her health and that of the boy was not such as to justify issuing a policy on her or the children.

I have read the foregoing affidavit, I have also inspected my records and the records of the New York Life Insurance Company on the matter, and this affidavit states my best recollection at this time of the events it mentions.

/s/ W. A. RATTENBURY.

Subscribed and sworn to before me this 10th day of March, 1948.

[Seal] /s/ SINCLAIR M. DOBBINS,
Notary Public in and for the County of Solano,
State of California.

Stipulation

It is stipulated by the parties to the above entitled action that, if called, W. A. Rattenbury of Dixon, California, affiant in the foregoing affidavit, will give the same testimony as that given in the foregoing affidavit.

I. M. PECKHAM,

Attorney for Plaintiff.

FRANK J. HENNESSEY,

U. S. Attorney,

By

Assistant U. S. Attorney.

[Endorsed]: Filed April 9, 1948.

LOUISE K. GODFREY

the plaintiff, called in her own behalf; sworn:

Direct Examination

By Mr. Peckham:

Q. Your name is Louise K. Godfrey?

A. Yes.

Q. You were the wife and are the widow of William S. Godfrey, Jr., deceased? A. I am.

(Testimony of Louise B. Godfrey.)

Q. And you were such in 1924 and down to the date of his death? A. Yes.

Q. He died, did he not, in 1944?

A. November 6.

Q. November 6, 1944. And in 1924 do you recall the circumstances of his taking out the \$15,000 policy of insurance that is introduced in evidence here? A. Yes, sir.

Q. You tell us in your own words just what took place with regard to that policy.

A. Mr. Godfrey took out the policy—

Q. What?

A. Mr. Godfrey took out the policy and before the trust [24] agreements were signed or made, why, he said he thought it was best that there be a trust agreement so that there would be a monthly income for me during my life and for Norma and for Bill, our son and our daughter—our daughter and our son.

Q. At that time, did he ask you to join in the settlement of the proceeds in these trusts—in the trusts?

A. He said that the New York Life would require me to sign the trust agreement and that he would keep up the polices in their full value for the protection of us.

Q. What did you say to him? Did you tell him that you would join in the trust agreement?

A. I said I would sign the trust agreement if he would keep it up for the protection of the children.

(Testimony of Louise B. Godfrey.)

Q. Do you recall the precise words that were used between you at that time?

A. Just that I asked if he would keep them up in their entirety for our protection.

Q. And what did he say?

A. And he said that he would.

Q. And did you thereupon consent to the erection of the trust agreements in the proceeds?

A. Yes.

Q. And subsequently the trust agreements were brought to you by a Mr. Rattenbury, were they not, and you did sign the trust agreements? That is your signature that appears on the [25] trust agreement?

A. Yes. You showed that to me.

Q. The same occurred in regard to the trust agreement of 1930 also, didn't it? A. Yes.

Q. The policy was issued in December of 1929 and sometime in February of 1930 the trust agreement was entered into? A. Yes, sir.

Q. And what did he say to you in regard to that trust agreement? A. I asked him—

Mr. Licking: Objected to as asked and answered. She said the same thing happened with reference to that, the same conversation as with reference to the first one.

The Court: Overruled.

A. What does that mean? He said that he thought the trust agreements were good for them to come in monthly installments again and I said

(Testimony of Louise B. Godfrey.)

that I would sign them if he would promise to keep them up or agreed to keep them up in their full—for their full face value. May I state something?

Q. (By Mr. Peckham): And what did he say to that?

A. And he said that he would keep them up.

Q. You wanted to add something to your answer?

A. This may be irregular, I don't know, but if anyone knows anything about the theatre business, why, the expenditures [26] of the theatres are very great and the investment is very great and usually one who has something must all the time make improvements and additions and definitely go forward and protect your own interests, and with each addition or each improvement why, usually if one does not have the money one borrows it or the company itself takes care of it, so any expenditures of the theatre are always taken care of from the income of the theatre itself, and our expenditures at the time in 1930 were pretty big because we had acquired the property and theatres of the North Beach—the Wigwam Theatre and also the Lane Theatre in the Irving District. So Mr. Godfrey was thinking at the time and that additional expense was particularly great in the theatres themselves and he thought of that, and there was quite a few thousand dollars owing at that time, but we knew that the income from the theatres would eventually take care of that, because the bank makes that ar-

(Testimony of Louise B. Godfrey.)

rangement itself. But for the personal upkeep of the family that was more or less an effort and that was one of the reasons that we talked it over and he and I both thought that would be the thing.

I may be irregular in saying that.

Q. The Court wants all that.

The Court: Theatre management was discussed with him at the time?

A. With Mr. Godfrey? He knew of that information, but I was just telling it so you might know. [27]

Q. (By Mr. Peckham): At the time the policies were taken out you and Mr. Godfrey had two children? A. Yes.

Q. One was Bill, the third, and one was Norma Godfrey? A. Yes.

Q. When was Bill born?

A. March 18, 1918.

Q. When was Norma born?

A. October 25, 1919.

Q. At the time this policy was issued Mr. Godfrey had just entered the theatre business in San Francisco, had he not?

A. No, sir, he entered the theatre business in 1916 in San Francisco.

Q. I was under the impression it was about that time. A. No, sir.

Q. In 1929 did the theatre suffer from the depression that was going on then?

A. Yes, sir.

(Testimony of Louise B. Godfrey.)

Q. In what way?

A. Well, falling off of attendance.

Mr. Licking: If the Court please, this seems to be entirely immaterial whether the theatre suffered from the depression or not. The same matter of the depression has been passed on by the Court in the affidavit, it is immaterial.

Mr. Peckham: I think it is material concerning the [28] making of the second contract.

The Court: I think I permitted that to remain in, the physical conditions. Overruled.

Q. (By Mr. Peckham): At the time the contract of 1929 was made, were you living in San Francisco?

A. Well, we went to Arizona in September of 1929.

Q. Why did you have to go to Arizona?

A. On account of my health and my son's.

Q. On account of your health and the health of your son, Bill? A. Yes.

Q. And Mr. Godfrey knew about that condition?

A. Yes.

Q. He visited you from time to time down in Arizona, did he not?

A. Yes. He lived there part of the time?

Q. What?

A. He lived there part of the time and then he would just visit.

Q. After the making of these contracts of insurance, did Mr. Godfrey pay all the premiums on them up to the time of his disablement?

(Testimony of Louise B. Godfrey.)

A. Yes.

Q. And he became disabled in the summer of 1937? A. Yes. [29]

Q. And you were appointed his guardian at that time? A. Yes.

Q. As the record shows here? A. Yes.

Q. And conducted the guardianship up to the time of his death and handled all matters of the guardianship up to the time of his death?

A. Yes.

Q. And he died, as you gave the date, November 6, 1944, and his will was admitted to probate and you were appointed executrix and the estate was distributed under the will and you were discharged?

A. Yes.

Q. You directed the putting in of these protests, signed both of them yourself— A. Yes.

Q. —at the time they were put in. During the time these policies were in effect Mr. Godfrey never borrowed on them, did he? A. No, sir.

Q. And he never attempted to assign the policies otherwise than in this agreement with you?

A. No, sir.

Q. The policies were in fact kept up in full force and effect until his death? A. Yes, sir.

Mr. Peckham: I think that is all. You may cross examine.

Mr. Licking: I have no questions.

Mr. Peckham: That is all. That is the plaintiff's case, your Honor.

Mr. Licking: If the Court please, I would like to make a motion and now renew all my objections to this parol evidence outside the trust agreements and move at this time to strike the evidence along that line which has been admitted by the Court, as having no bearing on the question involved, which is whether or not the trust agreements, being revocable, the designation of beneficiary being at the option, that so far as the United States and the taxpayer are concerned any outside agreement is immaterial and irrelevant, whatever might be the case if a third party were asserting claims contrary to the claim now asserted by the taxpayer.

The Court has already passed on the matter. I assume the Court will reserve a ruling on that evidence.

The Court: Well, there is always involved the legal sufficiency of evidence in support of a claim of a plaintiff. It is necessary in the final analysis to encompass the very objections that you are raising, so at this point the motion is denied.

Mr. Peckham: Now, if the Court please, unfortunately there is no precise ruling on this point anywhere in the books—

The Court: Do counsel wish to brief it? [31]

Mr. Peckham: What?

The Court: Do counsel wish to brief it?

Mr. Peckham: I think we will have to, your Honor. There are a number of cases—

The Court: You rest, do you, Mr. Licking?

Mr. Licking: Yes, the evidence is in, the return and the assessment.

The Court: What is counsel's pleasure as to the time?

(Discussion as to briefs, and the matter was ordered submitted on briefs thirty, thirty, and twenty.)

CERTIFICATE OF REPORTER

I, Clarence F. Wight, official reporter, certify that the foregoing 32 pages is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting, to the best of my ability.

/s/ CLARENCE F. WIGHT.

[Endorsed]: No. 12277. United States Court of Appeals for the Ninth Circuit. Louise K. Godfrey, Appellant, vs. James G. Smyth, United States Collector of Internal Revenue at San Francisco, California, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed June 23, 1949.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12277

LOUISE K. GODFREY,

Appellant,

vs.

JAMES G. SMYTH, United States Collector of
Internal Revenue,

Appellee.

STATEMENT OF POINTS AND
DESIGNATION OF RECORDTo the Clerk of the United States Court of Appeals
for the Ninth Circuit, and to the attorneys for
appellee:In accordance with the provisions of Rule 19,
subdivision 6, of the Rules of Practice of the above
entitled court, the appellant, Louise K. Godfrey,
files this Statement of Points and Designation of
Record on Appeal on her appeal in the above en-
titled cause:

1. Appellant adopts on this appeal the State-
ment of Points on Appeal filed with the Clerk of
the trial court, as incorporated in the Record on
Appeal;
2. Appellant desires to have printed the entire
record, subject to any order of the above entitled
court dispensing with the reproduction or printing

of exhibits and providing for the consideration of the originals.

Dated, San Francisco, June 24, 1949.

/s/ I. M. PECKHAM,

Attorney for Appellant Louise
K. Godfrey.

Copy of the foregoing Statement of Points and Designation of Record received this 24th day of June, 1949.

/s/ FRANK J. HENNESSY,
U. S. Attorney.

